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FORCING PROTECTION ON CHILDREN AND THEIR PARENTS: THE IMPACT OF *WYMAN v. JAMES*

Robert A. Burt*

THE striking significance of *Wyman v. James*¹ does not lie in the Supreme Court's resolution of the immediate controversy between the parties. Whether or not the Court had required welfare caseworkers to obtain search warrants before payments could be terminated for AFDC recipients who refused to permit home visits, it seemed likely that welfare practices would be hardly affected.² *Wyman's* special importance comes rather from what it symbolizes and foretells. Mrs. James' resistance to her welfare caseworker's home visit challenged three increasingly important government claims to power. First, Mrs. James claimed privacy of her home from government intrusion in a time of increasing government capacity and apparent willingness to derogate from individual privacy.³ Second, Mrs. James challenged the government's insistence that derogation of her privacy was the price of receiving public funds, in a time of widespread public dependence on government largesse, increasingly accompanied by an entangling web of consequential obligations.⁴ Third, Mrs. James claimed authority to define her own needs among the various types of welfare assistance available. But the government insisted that it knew better, as it increasingly claims when forcing assistance on other unwilling recipients—whether they be the “mentally ill,” children in “moral danger” as evidenced by their conduct,

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1. 400 U.S. 309 (1971).

2. The three-judge court, which the Supreme Court reversed, had imposed a warrant requirement, but the warrant would issue on a showing less demanding than criminal “probable cause,” and no warrant would be required if the welfare recipient consented to the home visit. *James v. Goldberg*, 303 F. Supp. 935, 943-44 (S.D.N.Y. 1969). If the Supreme Court had affirmed this judgment, it is unlikely that more stringent conditions would have been imposed on the warrant requirement and, in any event, it would have been wrong for the Court to do so. See text following note 141 *infra*. With these permissive conditions—and particularly with the possibility for waiver by individual welfare recipients—it seems unlikely either that many welfare recipients would bring court challenges or that many challenges would succeed. See Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 9-13 (1969).

3. See, e.g., A. MILLER, *THE ASSAULT ON PRIVACY* (1971).

4. See, e.g., R. O'NEIL, *THE PRICE OF DEPENDENCY* (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

children who are "neglected or abused" as evidenced by their parents' conduct, narcotics users, or public alcoholics.⁵

The Supreme Court refused to honor any of Mrs. James' claims. It would be wrong to construe that refusal as a pronouncement that none of the more general problems resounding from her claims deserves judicial attention or is amenable to judicial remedies. But the *Wyman* decision quite obviously means that a six-member majority of the Court was not sufficiently aroused by any of these problems, or sufficiently persuaded that the Court should now address them, that it wanted to seize the opportunity that Mrs. James offered.⁶ And it can readily be argued that this opportunity could have been seized precisely because imposing a warrant requirement on welfare home visits would vindicate the symbolic values claimed by Mrs. James without adding any significant burden to welfare administration. Thus, the Court's failure to do battle for the claims that Mrs. James invoked might appear to be a particularly telling portent of judicial reluctance to address these problems.

Viewed narrowly, the result in *Wyman* is not unreasonable. The welfare caseworker had apparently been quite solicitous of Mrs. James' convenience in setting an advance date for her visit;⁷ and there is clearly a sensible governmental interest in assuring that its funds—whether in welfare grants or in service and supply contracts—are spent for the purposes it intended.⁸ But it is difficult, and ultimately wrong, for the Court to have viewed its decision thus narrowly. A warrant requirement, if properly designed, need not have disabled the government from pursuing its legitimate ends. It would, however, have signified judicial skepticism of the general reach of the governmental powers asserted, and would have announced the Court's determination to use its remedies, however limited, to assure that the legitimate government interests claimed are not stretched beyond their proper bounds. The *Wyman* Court's refusal to be skeptical of the government's claims is ultimately the most troubling and most portentous aspect of the case.

This Article will focus on one of the concerns implicated in

5. See, e.g., N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* ch. I (1969).

6. Justice Blackmun wrote the majority opinion, his maiden effort, for the Court. Justices Douglas, Marshall, and Brennan dissented. 400 U.S. at 326, 338.

7. 400 U.S. at 313.

8. The Court made this point in a peculiarly provocative manner: "One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same." 400 U.S. at 319.

Wyman: the government's power to force assistance for the protection of children, when they or their parents are unwilling to accept that assistance. The state's protective purposes in insisting that Mrs. James accept its assistance or suffer serious loss of benefits played an important role in the *Wyman* decision. Only a few years ago, in *In re Gault*,⁹ the Court refused to defer to a state's similarly beneficent motives when it was asked to withhold the imposition of procedural safeguards in juvenile delinquency proceedings. *Wyman* does not overrule *Gault*. But the suppositions underlying the two cases are vastly different. In order to assess the prospects of *Gault*'s growth even in the juvenile court context, and the probable judicial attitude to other governmental exercises of benevolent coercive powers, it is instructive to set the underlying premises of the two cases side by side.

I. DEFERRING TO GOVERNMENTAL BENEVOLENCE IN PROTECTING PARENTS AND CHILDREN: WYMAN AND GAULT CONTRASTED

Barbara James was not a wholly unwilling recipient of government assistance. She wanted welfare funds. She did not, however, want those funds accompanied by home visits from her caseworker—Mrs. James' "friend in need," as the Court rather gratuitously identified her.¹⁰ But the Court was willing to insist that Mrs. James accept the unwanted as well as the wanted assistance. To justify this position, the Court repeatedly invoked the government's "benevolent motivation" in offering the unwanted assistance. The Court noted that the "rehabilitative" aspect of the "caseworker's posture in the home visit" in significant part prompted its conclusion that there was no "search in the traditional criminal law context," so that the fourth amendment warrant requirement could be deemed wholly irrelevant to the case.¹¹ Although this portion of the opinion is puzzlingly obscure, the Court comes close to resurrecting "civil-criminal" labeling as a technique for applying the fourth amendment, and to manipulating those labels by reference to the apparent beneficence of the government's purpose.¹² Similarly, in those parts of the Court's opinion in which it is assumed, for purposes of argu-

9. 387 U.S. 1 (1967).

10. The Court said: "The caseworker is not a sleuth but rather, we trust, is a friend in need." 400 U.S. at 323.

11. 400 U.S. at 317.

12. Compare *Camara v. Municipal Court*, 387 U.S. 523, 530-31 (1967), discussed in text following note 128 *infra*. Justice White, the author of the *Camara* opinion, refused to join in this portion of the *Wyman* Court's opinion, though he concurred in all else. 400 U.S. at 326.

ment, that the welfare home visit "does possess some of the characteristics of a search in the traditional sense,"¹³ the government's protective purpose—both for Mrs. James and for her child, for whose well-being "the [welfare] worker has profound responsibility"¹⁴—played a central role for the Court in establishing the "reasonableness" of the search.

Although the ascription of benevolent motive was important to the Court in justifying the challenged government action, the Court did not think it necessary to cut beneath the surface of the government's allegations. This is not to say that the Court should or could have suspected that the welfare agency was secretly harboring evil motives. The Court could accept that the agency made its benevolent protestations in good faith, and yet might still doubt that there was any likelihood that those beneficent motives would be realized in practice. On the face of the record in *Wyman*, there was good reason for the Court to doubt that any of the beneficent purposes of the welfare home visit were likely to be accomplished. It borders on the absurd to think that any friendly assistance that might be offered by the caseworker would be accepted in a benevolent spirit by the welfare recipient, Mrs. James, who—it must be re-emphasized—refused to accept a visit from this "friend in need." Indeed, the Court chose to notice some clues about Mrs. James' attitude that it derived from case records appended to the state's brief, alleging that Mrs. James was "belligerent" and "evasive."¹⁵ It was doubtful taste or judicial propriety for the Court thus to slur Mrs. James' character without giving her an opportunity to test the bases for these conclusions in open court. Nevertheless, since the Court was willing to give some credence to these caseworkers' allegations, it should have realized that the accompanying allegation by the welfare caseworkers must resound hollowly, that one purpose of their proposed visit was to offer helpful services to Mrs. James. The Court did not see the need to ask whether the kinds of services which the caseworkers intended to provide would require the willing cooperation of the recipient.¹⁶

13. 400 U.S. at 318.

14. The Court stated:

The visit is not one by police or uniformed authority. It is made by a caseworker of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. 400 U.S. at 322-23 (footnote omitted).

15. 400 U.S. at 322 n.9.

16. In theory, the caseworker's visit is intended both to provide some direct services and to determine whether the welfare recipient needs additional services. This theory follows from

If this question had been pursued and if the answer were returned that such cooperation would be necessary, then the beneficent face of this aspect of the visit would vanish, taking with it an important part of the Court's articulated basis for refusing to view this visit as an adversarial search.

It might nonetheless be argued that the welfare of Mrs. James' son, Maurice, was at stake and that he would be protected by this visit. Such an argument would subordinate Mrs. James' privacy claims to the protective interests of her son.¹⁷ On this matter, the Court saw fit to mention that according to the caseworker records: "[A]ll was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite)."¹⁸ But though it might be assumed that the purpose of the home visit was beneficent toward Maurice, in fact the caseworker did not ask to see Maurice in the notification provided to Mrs. James to arrange the visit. And there

the 1962 amendments to the Social Security Act [42 U.S.C. §§ 601-05 (1964)], and earlier ones in 1956 [42 U.S.C. §§ 301-03 (1964)], announc[ing] the new philosophy of encouraging the states to institute or expand a variety of service programs: counseling, training, vocational rehabilitation, home management, and so on.

Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. 377, 392-93 (1966).

A recent survey of AFDC recipients in Wisconsin indicates both the kinds of services typically offered and the attitudes with which those services were regarded:

Our overall finding was that very little social service activity goes on. This follows from the pattern of caseworker visits. Since the caseworkers visit the clients so infrequently and for such short periods of time, there is of necessity very little supportive service work or regulation of clients' lives. According to client responses, once budgets were established there were few basic changes and few requests for special grants for extra needs, and there was practically no supervision of how the client spent the money. In the other social service areas caseworkers tended to stay away from troublesome issues, and, with the exception of the health area where they did help clients use Medicaid, they offered little concrete assistance. Within that context of very low social service activity, most clients were not particularly bothered or upset.

While there was little overall dissatisfaction with social services activity, there were differences among specific areas. Whereas less than 10 percent were bothered or annoyed about discussions of children and health, more than one out of four were bothered by discussions about home care and social life. Clients' annoyance in these areas did not affect overall attitudes very much, since these discussions occurred rather infrequently. Feelings of coercion, of being forced to follow the caseworker's advice, varied with how immediately useful the client felt the caseworker services were: When the caseworkers offered concrete tangible help—in health matters, for example—clients said that they had to follow the caseworker's advice. In discussions about home care and social life most clients felt no coercion.

Handler & Hollingsworth, *supra* note 2, at 10.

17. The *Wyman* Court embraced this argument:

The public's interest . . . is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.

400 U.S. at 318.

18. 400 U.S. at 322 n.9.

was no assurance that the caseworker intended to locate the child if he were not at home on the day of the visit.¹⁹

The *Wyman* Court simply did not think it important to pursue the question whether any of the arguably beneficent purposes of the coerced home visit had any probability of accomplishment. But that question must be the core of judicial inquiry if there is to be any hope of civilizing the wide-ranging impositions of governmentally coerced help to unwilling recipients.

The insistence with which the *Wyman* Court avoided this question is revealed in startling boldness by the following footnote in the opinion:

11. The *amicus* brief submitted on behalf of the Social Services Employees Union Local 371, AFSCME, AFL-CIO, the bargaining representative for the social service staff employed in the New York City Department of Social Services, recites that "caseworkers are either badly trained or untrained" and that "[g]enerally, a caseworker is not only poorly trained, but also young and inexperienced" Despite this astonishing description²⁰ by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty.²¹

Why *must* the Court *assume* this? What might follow if the Court chose to assume the contrary? Might not the contrary assumption compel the Court to demand greater assurance, if only by imposing a minimally burdensome warrant requirement, that the benefits claimed to be bestowed by these caseworkers will in fact be visited upon the unwilling recipients? Why should the Court be reluctant to demand such assurance?

It is striking to compare the *Wyman* footnote eleven with the directly opposing view regarding the uses of judicial power revealed in footnote fourteen of the *Gault* opinion, citing studies which showed the scant training of juvenile court judges.²² The *Gault*

19. See 400 U.S. at 342 (Justice Marshall, dissenting); 303 F. Supp. at 943 (majority opinion of the three-judge court below).

20. Astonishing because of its honesty? Astonishing because it is not believable? Astonishing because it is de rigeur for a labor union to turn the same blind eye to this reality that the Court resolutely turns?

21. 400 U.S. at 322-23 n.11.

22. The *Gault* Court's footnote fourteen was this:

The number of Juvenile Judges as of 1964 is listed as 2,987, of whom 213 are full-time Juvenile Court judges. [Citing National Council of Juvenile Court Judges, Directory and Manual (1964) at 305.] The National Crime Commission Report indicates that half of these judges have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-quarter of their time to juvenile matters. See also McCune, Profile of the Nation's Juvenile Court Judges (monograph, George Washington Uni-

Court found these studies relevant to the likelihood that the juvenile courts' promises of treatment and rehabilitation would be kept. But both *Gault* and *Wyman* only implicitly address the propriety or utility of the judicial role each undertook. Thus nothing necessarily dispositive is said by pointing out that the underlying suppositions of *Wyman* are directly antithetical to those of *Gault*. It must be reiterated, however, that to the extent that *Wyman* relies on the specially benevolent character of the governmental power at issue in order to reach a result it could not otherwise rationally justify,²³ the Court cannot with intellectual integrity so blandly overlook suggestions that this presumed special character is a chimera.

The record in *Wyman* did not illuminate for the Court the workings and quality of the New York City welfare administration. Indeed, at several points in the Court's opinion, Justice Blackmun notes the skimpiness of the record.²⁴ Although the *Gault* record was no more extensive,²⁵ it might be argued that the context of juvenile court proceedings, with its obvious analogues in criminal proceedings, made the *Gault* Court more comfortable at intervening. Welfare practices and problems, however, are less familiar to the Court. Unless some such distinction is drawn, *Wyman* suggests that in juvenile court matters the current Court will refuse to draw the implications of *Gault* beyond those proceedings in which a juvenile is charged with an offense that would be a crime if committed by an adult.²⁶ *Wyman* might thus imply that the important "status"

versity, Center for the Behavioral Sciences, 1965), which is a detailed statistical study of Juvenile Court Judges, and indicates additionally that about a quarter of these judges have no law school training at all. About one-third of all judges have no probation and social work staff available to them; between eighty and ninety percent have no available psychologist or psychiatrist. *Ibid.* It has been observed that while "good will, compassion, and similar virtues are . . . admirably prevalent throughout the system . . . expertise, the keystone of the whole venture, is lacking." Harvard Law Review Note, p. 809. In 1965, over 697,000 delinquency cases (excluding traffic) were disposed of in these courts, involving some 601,000 children, or 2% of all children between 10 and 17. Juvenile Court Statistics—1965, Children's Bureau Statistical Series No. 85 (1966), p. 2.

387 U.S. at 14-15 n.14.

23. See text accompanying notes 11-14 *supra*.

24. 400 U.S. at 313, 320 n.8, 321.

25. See the separate opinions in that case of Justice White, 387 U.S. at 64, and Justice Harlan, 387 U.S. at 76.

26. Gerald Gault was charged in Arizona Juvenile Court with making an obscene phone call to a woman. For an adult, such conduct, if proved, would violate ARIZ. REV. STAT. ANN. § 13.377 (1956). See 387 U.S. at 8. The juvenile court judge in *Gault* did not think it necessary to decide whether he had jurisdiction over Gerald because of his alleged violation of an adult criminal statute (a "criminal" offense) or because that conduct in part indicated that Gerald was "habitually involved in immoral matters" (a "status" offense). 387 U.S. at 8-9. The *Gault* Court was similarly imprecise in its characterization when it stated:

We consider only the problems presented to us by this case. These relate to pro-

jurisdiction of the juvenile court—such as commitment for “incorrigibility,”²⁷ “habitually idl[ing] away [one’s] time,”²⁸ or being a “person in need of supervision”²⁹—will remain undomesticated³⁰ by the Court. Studies of juvenile court practice suggest that these special status commitments account for between one fourth and one half of the current cases.³¹ If it is easier for juvenile courts to dispose of such cases—because attorneys need not be involved, court hearings require less formality, and information regarding the juvenile is more easily available—then reliance on these status adjudications, which wholly overlap the “specific crime” jurisdictions, will become increasingly attractive to juvenile courts. As a result, the procedural strictures of *Gault*, unless extended to status adjudications, will have a declining impact on the operations of juvenile courts.

It may be that *Gault* should become increasingly irrelevant, particularly if some clear competing interest will be unduly compromised by extending *Gault*’s impact on the juvenile court. This is the premise of Chief Justice Burger’s recent complaint that the Supreme

ceedings by which a determination is made as to whether a juvenile is a “delinquent” as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.

387 U.S. at 13. Subsequently the Court, in extending to juvenile proceedings the rule that allegations must be proved by the criminal standard of “beyond reasonable doubt,” described that holding as applicable to “the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.” *In re Winship*, 397 U.S. 358, 359 (1970). The Court did not make clear whether this description was meant to qualify the holding in *Gault*, whether this was a limitation restricted to the standard of proof question alone, or whether this description was no more than a description and would not limit the Court from extending the “reasonable doubt” standard in a future case to “noncriminal” juvenile delinquency proceedings.

27. See, e.g., the Arizona statute involved in *Gault*:
“Delinquent child” includes:

“ . . .
(b) A child who, by reason of being incorrigible, wayward or habitually disobedient, is uncontrolled by his parent, guardian or custodian.

ARIZ. REV. STAT. ANN. § 8-201-6 (1956), later amended, ARIZ. REV. STAT. ANN. § 8-201-9 (Supp. 1970), cited at 387 U.S. 1, 9 n.6 (1967). See also Weiss, *The Poor Kid*, 9 DUQUESNE L. REV. 590, 605 (1971).

28. See MICH. COMP. LAWS, § 712A.2(d)(6) (1968).

29. See N.Y. FAMILY CT. ACT, §§ 711-12, 742-45 (McKinney 1963).

30. The phrase is Dean Paulsen’s, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233.

31. G. Mueller, M. Gage, and L. Kupperstein conclude that “juvenile status offenses (runaway, truancy, curfew violations, ungovernable)” constitute 22.8% of cases processed in 1965 by a representative sample of juvenile courts across the country. *THE LEGAL NORMS OF DELINQUENCY: A COMPARATIVE STUDY* 14 (1969) [hereinafter MUELLER]. N. MORRIS & G. HAWKINS, *supra* note 5, at 160, notes that in California in 1966 arrests for “‘delinquent tendencies,’ which include such behavior as incorrigibility, waywardness, runaway and truancy” were 63% of all juvenile arrests, and they suggest generally that these juvenile status designations constitute about one half of the cases disposed of by juvenile courts.

Court has been captivated by the merely formal analogies between juvenile and ordinary criminal proceedings and that "the juvenile court system needs . . . not more but less of the trappings of legal procedure and judicial formalism."³² But the Chief Justice then immediately made clear that he reached this conclusion only by choosing to ignore whether juvenile courts can in fact perform their beneficent promises. "[M]uch of the judicial attitude manifested by the Court's . . . holdings in this field," he said, "is really a protest against inadequate juvenile court staffs and facilities; we 'burn down the stable to get rid of the mice.'"³³ Thus he articulated the same proposition put forward by footnote eleven of the *Wyman* opinion: inadequate government staff or facilities are not relevant to the Court's function in reviewing the exercise of governmental power based on purportedly benevolent purposes. The Chief Justice implicitly rejects the suggestion that the Court is appropriately reacting to the inadequacies of benevolent-seeming agencies by imposing procedural stringencies that require agencies to make a compelling case before they can force anyone to accept their help.

Undoubtedly, by requiring these procedures, some cases in which available treatment could have materially assisted the juvenile will be lost. But it seems equally clear that without vigorous partisan advocacy directed against imposed treatment, without clear standards of proof and precise formulations by juvenile court personnel of both the reasons for the imposition of treatment and the relation of the particular treatment envisioned to these reasons—without, that is, satisfying the procedural requirements that *Gault* and its progeny envision³⁴—intervention is likely to be commanded in some cases in which it is not only useless but also (or, one might simply say, therefore) affirmatively harmful to the individual juveniles involved.³⁵ No

32. *In re Winship*, 397 U.S. 358, 376 (1970) (Chief Justice Burger, dissenting). In this dissent from the Court's holding that the criminal standard of proof must apply in juvenile proceedings, the Chief Justice was joined by Justice Stewart, who wholly dissented alone in *Gault*. See 387 U.S. at 78.

33. 397 U.S. at 376. A similar attitude appears in Justice Blackmun's recent opinion, joined by three other Justices, in *McKeiver v. Pennsylvania*, 39 U.S.L.W. 4777 (U.S. June 21, 1971):

Of course there have been abuses [in the operations of juvenile courts]. . . . We refrain from saying at this point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication *rather than* to inherent unfairness.

39 U.S.L.W. at 4783 (emphasis added). *McKeiver* is discussed in notes 108 & 110 *infra*.

34. See *In re Winship*, 397 U.S. 358 (1970), discussed in note 26 *supra*.

35. Compare, e.g., the conclusions reached, on the basis of an imaginatively constructed empirical study, that "what legal authorities now commonly do upon apprehending a juvenile for his delinquent behavior is worse than not apprehending him

firm quantitative resolution of the relative costs of each alternative can be made. But the choice between the alternatives is inescapably before the Court. The central question that both *Gault* and *Wyman* appear to present is whether the Court should itself weigh these competing advantages and resolve the issue, or whether it should defer to the judgments of some other agency, legislative or administrative. The two cases disagree on the answer to this question.

In neither *Gault* nor *Wyman* did the Court see any pressing need to articulate and justify its view of judicial institutional capacities. No matter what distinctions are drawn between the cases, there is stark contrast in *Wyman* and *Gault* in their revealed judicial attitudes toward government protection and benevolence as justification for coercing the acceptance of unwanted assistance. The two cases appear to express dramatically opposite views regarding the propriety of, and the necessary evidentiary basis for, judicial disbelief in the reality of such protection. It may be that *Wyman*, in welfare administration, and *Gault*, in juvenile court administration, will continue on separate paths and that the courts will simply refuse to acknowledge and choose between their competing presuppositions. However, in a different context, which the Supreme Court has not yet reviewed, the necessity for choice cannot be avoided. That context is the procedures for the administration of child abuse and neglect laws.

II. PROTECTING CHILDREN FROM THEIR PARENTS: WYMAN VS. GAULT

Neither *Gault* nor *Wyman* obviously applies, one excluding the other, to child abuse and neglect laws. It might appear that criminal law analogues more closely track the purposes and impact of the abuse and neglect laws than the administration of welfare laws. Thus *Gault* beckons. But it might appear that the interests of parents subject to abuse or neglect law proceedings are more directly in conflict with the interests of their possibly maltreated children than in the administration of juvenile delinquency laws. Thus *Wyman* beckons. To determine which case should govern here, the questions which have been begged or resolved only implicitly in both *Wyman* and *Gault* must be brought into clearer focus.

Criminal law procedures are considered inapplicable to child

at all. . . . [A]pprehension itself encourages rather than deters further delinquency." Gold & Williams, *National Study of the Aftermath of Apprehension*, 3 PROSPECTUS 1, 3 (1969).

On socially imposed "negative identities" which become self-fulfilling prophecies for those labelled "delinquent," see, e.g., E. ERIKSON, *CHILDHOOD AND SOCIETY* 307-08 (1950); *id.*, *INSIGHT AND RESPONSIBILITY* 97-98 (1964).

abuse and neglect laws in many states. In proceedings in which parents may be deprived of child custody for neglect or abuse (as opposed to criminal prosecution for such conduct), parents are not guaranteed the presence of counsel,³⁶ no "presumption of parental innocence" effectively guarantees retention of custody by the parent prior to final adjudication of abuse or neglect,³⁷ the burden of proof at trial is the civil "preponderance of the evidence" rather than the criminal standard,³⁸ courts may rely on confidential information to determine the existence of neglect or abuse without giving confrontation opportunities,³⁹ and no "self-incrimination right" or fourth amendment "probable cause" requirement restrains courts from ordering pretrial physical or psychiatric examinations of parents or children to determine neglect or abuse.⁴⁰

Gault clearly invites testing the propriety of this civil procedure model. Particularly if one invokes the test for applying "criminal" or "civil" labels that the Court set out in *Kennedy v. Mendoza-Martinez*⁴¹ (but which *Gault* eschewed), the case for "criminalizing"

36. See ILL. REV. STAT. ch. 37, § 704-5 (Smith-Hurd 1971), which assures appointed counsel for a child but not for his parents in such proceedings; to the same effect are MASS. ANN. LAWS ch. 119, § 29 (1965); MICH. COMP. LAWS § 712A.17 (1968); N.Y. FAMILY CT. ACT § 249 (McKinney 1963); VA. CODE § 16.1-175 (1960). By contrast, California and Wisconsin permit, though neither state requires, appointment of counsel for parents in abuse or neglect proceedings. See *County of Alameda v. Espinoza*, 243 Cal. App. 2d 534, 52 Cal. Rptr. 480 (1966); WIS. STAT. ANN. ch. 48, § 25(6) (1957).

A survey of child neglect proceedings in one New York county found that parents were unrepresented by counsel in 76% of the cases, and that the presence of counsel at any stage of the proceeding appeared to have marked impact in favor of the parents. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. L. & SOC. PROBS. 230, 238, 241-44 (1968).

37. In 1967-1968, the Family Courts in New York State disposed of 6347 child neglect petitions. Of those, 1759 children (or about 26%) were removed from their homes pending final disposition of the petitions (286 children—or 4.5% of the total—were removed from their homes before any neglect petition was filed, and the remainder were removed after a petition was filed). Of these 1759 children, approximately 44% remained in a "short-term care" detention facility for more than 90 days pending disposition of the neglect petition. See REPORT OF N.Y. STATE FAMILY COURT, 1967-68. See N.Y. FAMILY CT. ACT §§ 1021-28 (McKinney Supp. 1971), which provide for temporary home removal of children both with and without court orders. See also MASS. ANN. LAWS ch. 119, § 39-B (Supp. 1970); MICH. COMP. LAWS § 712A.15 (1968), § 722.571(a) (Supp. 1971); VA. CODE §§ 16.1-166, -194 (1960).

38. See ILL. ANN. STAT. ch. 37, § 704-6 (Smith-Hurd 1966); MD. ANN. CODE art. 26, § 70-18(c) (1966); N.Y. FAMILY CT. ACT § 1046(b)(i) (McKinney 1963); WIS. STAT. ANN. ch. 48, § 25(3) (1957).

39. See D.C. CODE ANN. § 11-1586(b) (1967); ILL. STAT. ANN. ch. 37, § 705-1(2) (Smith-Hurd 1966); MD. ANN. CODE art. 26, § 70-14 (1966); N.Y. FAMILY CT. ACT § 1047(b) (McKinney 1963). Other states do, however, provide full confrontation rights in these proceedings. See CAL. CIV. CODE § 4602 (West 1970); MASS. ANN. LAWS ch. 119, § 24 (1965); VA. CODE § 16.1-162 (1960).

40. See MD. ANN. CODE art. 26, § 70-14(c) (1966); N.Y. FAMILY CT. ACT § 251 (McKinney 1963); VA. CODE § 16.1-190 (1960).

41. 372 U.S. 144 (1963).

abuse and neglect statutes seems compelling. The *Mendoza-Martinez* questionnaire was this. First, is there an "affirmative disability or restraint"?⁴² worked by these laws? To lose custody of one's child surely is that, whether viewed from the perspective of the parent who wants to keep his child or from that of the child who, however benightedly and however much precisely because he has been maltreated, wants to remain with his parent.⁴³ Second, have such laws "historically been regarded as a punishment"?⁴⁴ The punitive stigma of child abuse and neglect laws is considerable, again whether viewed from the parent's perspective or from that of the child, who may see his removal not as a product of court coercion directed against an unwilling parent, but—once again, often precisely because he has been maltreated—as a punishment inflicted on him by an omnipotent parent who now deserts him.⁴⁵ In response to the third inquiry of *Mendoza-Martinez*, the "traditional aims of punishment—retribution and deterrence"⁴⁶ are obviously involved in the operation of these laws. Of the remaining *Mendoza-Martinez* questions, only one might be considered inapplicable here, that is, child removal for neglect or abuse does not necessarily turn on the parents' *scienter*.⁴⁷ Nonetheless, in practice it is clear that the courts' view of the existence of parental *scienter* is highly relevant to the severity of their response, and in particular to loss of custody as opposed to milder sanctions such as reprimands or impositions of protective services.⁴⁸

Finally, *Mendoza-Martinez* instructs courts to ask "whether an alternative purpose to which [the statute in question] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."⁴⁹ Here, as noted earlier,⁵⁰ seems the fail-safe proposition by which the courts might shake free of the criminal characterization. The purpose of these

42. 372 U.S. at 168.

43. See text accompanying note 76 *infra*.

44. 372 U.S. at 168.

45. See A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 58-61 (1965).

46. 372 U.S. at 168.

47. 372 U.S. at 168.

48. For example, the New York Family Court Act distinguishes between an "abused child" and a "neglected child" in part based on whether "injury" was inflicted on the child "by other than accidental means." N.Y. FAMILY CT. ACT §§ 1012(e), (f) (McKinney 1963). Only for allegedly "abused" children, child-protective agencies must seek court approval either to return children to their homes pending court action on filed petitions, or to dismiss filed petitions. N.Y. FAMILY CT. ACT §§ 1026(a)(ii), 1033(b) (McKinney 1963). See also D. GIL, *VIOLENCE AGAINST CHILDREN* 5-6 (1970); Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 701-02 (1966).

49. 372 U.S. at 168-69.

50. See text accompanying note 17 *supra*.

laws, it might be argued, is not (or not so much) punishment of the parent but protection of the child. To recall the Court's formulation in *Wyman*:

There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.⁵¹

But, if the statement in *Mendoza-Martinez* is to be taken at face value, the Court must ask whether the deprivation of the parental rights at issue in child neglect and abuse laws "appears excessive" in relation to the child-protective purposes of those laws. The calibration of cost/benefit is thus a judicial task. One might argue that *Mendoza-Martinez* was wrong in this regard; this is *Wyman's* implicit argument. But this argument is wrong. The need for an independent judicial evaluation arises because the criminal law analogue is so obviously close to the impact of neglect and abuse laws, and because the judiciary is charged by the tradition of the Constitution to determine for itself the application of the criminal procedure guarantees. How can such an evaluation proceed without asking whether the diminution of parental procedural rights is "excessive," both because such diminution is unnecessary to accomplish the precise protective purposes that the state might intend to pursue and because the protective services are in fact chimerical? The latter question in particular is an issue of "constitutional fact."⁵²

But though this recitation of the litany from *Mendoza-Martinez* does clearly support the proposition that courts must independently evaluate the reality of the protective purposes of these laws, this conclusion still begs a crucial question. It cannot be denied that *some* children found neglected or abused under the various state laws must for their welfare be removed from their parents. It is equally true that if the legislature, perhaps drawing from the ancient plagues visited on Egypt, provided that every tenth child on state census rolls should be separated from his parents, *some* children who for their benefit should be removed would by chance selection in fact be removed. The sensitivity of the interests at stake would undoubtedly lead any court to declare this scheme irrational and, therefore, by minimal equal protection standards, unconstitutional.⁵³

No legislature has acted or, at least, has admitted to acting thus

51. 400 U.S. at 318. See note 17 *supra*.

52. Compare *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

53. Compare *Meyer v. Nebraska*, 262 U.S. 390 (1923), discussed in text following note 68 *infra*.

randomly. In all contested cases of alleged abuse or neglect, state laws require a court to engage in individualized inquiry.⁵⁴ Ideally, this legislative command should lead a court to delve deeply into the psychological dynamics of the family before it, and to formulate a precise diagnostic view of that family from which it is possible to make three central judgments: first, whether the child is suffering serious harm (though for severe physical injuries, this ground for psychological inquiry can be redundant); second, whether grave risks would attend removing the particular child from his otherwise harmful family; and third, whether treatment was available that would respond to the psychology of this particular family. There is powerful support in the professional literature for the proposition that any judgment to remove a child from his parents that is not thus firmly based on a clear view of family and individual dynamics is a wholly random intervention.⁵⁵ This professional view provides strong support for any judicial impulse to require closer, more detailed attention to the individual characteristics of the particular family allegedly requiring state intervention. For this purpose, constitutional "domestication" of court procedures, by imposing the "criminal" label on these proceedings, is obviously attractive.

But it would be a mistake for a court simply to adopt wholesale, via the Constitution, this professional view of the need for precise diagnostic formulations. This is not simply because a court should disbelieve professional claims to precision. In the hands of the most skilled practitioners, there can be compelling clarity and precision in the use of psychological diagnostic tools. Nor should a court withhold allegiance from these views simply because of the obvious dearth of such skilled practitioners, particularly in the low-status, low-paying child-protective agencies. Rather, if imprecision is inherent in the discipline or in its application to child abuse and neglect cases, that is reason for a court to insist on greater precision through procedural strictures designed to approach the ultimately unattainable ideal.

A court must, however, consider these factors as reasons to abstain from imposing procedural strictures because there is room for a quite reasonable, competing judgment that some strong pressure must be exerted to urge removal of children. Such pressure may be

54. See, e.g., MICH. COMP. LAWS §§ 712A.11, .12, .14 (1968).

55. See generally J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE*, esp. ch. 7 (2d ed. 1965); D. GIL, *supra* note 48, esp. ch. II; Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in *THE BATTERED CHILD* 103, 144 (Helfer & Kempe ed. 1968); Text & Watson, *The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion*, 124 AM. J. PSYCHIATRY 1432 (1968).

necessary precisely because of the diagnostic imprecision and low skill of state child-protective personnel, which can lead to wrongful withholding of state intervention. There may be reason to believe that state child-protective services, even operating under current, relatively lax procedures, do not intervene in families as often as would be desirable in order to protect children.⁵⁶ Professional uncertainty, either from inherent diagnostic imprecision or from the imprecisions of unskilled personnel, can lead as readily to inaction as to excessive action. Moreover, the invisibility of most transactions between parent and child, particularly the preschool child, are intrinsic limiting factors on the possibility of any state intervention predicated on individualized inquiry, no matter how lax the standards of that inquiry.⁵⁷ It is thus quite reasonable to assert that imposing added burdens on these proceedings is at least quixotic, if not harmful. But if there are "reasonable" arguments that a legislature can adduce to justify relaxed procedural standards for neglect and abuse laws, this fact merely recasts for the courts the basic question of the propriety of these relaxed procedures. Are those competing arguments "reasonable enough" to justify rejecting the relevance of the criminal law analogues to these laws? Must, instead, the competing legislative arguments be "compelling"? Or are these arguments so "reasonable" that they are "compelling"?⁵⁸

The paradoxical character of this inquiry—that is, the strong pulls both to reject and to accept the legislative judgment regarding the need for relaxed procedures in abuse and neglect laws—can be graphically seen in the experience of the New York State Legislature

56. Compare the conclusion recently reached by the New York State Board of Social Welfare:

The most serious deficiency in the New York City system of children's services is the low priority given to early identification of children in jeopardy or potential jeopardy and the failure to develop helping services for them and their families before serious and sometimes irreversible tragedies occur.

N.Y. Times, May 16, 1971, § 1, at 57, col. 1.

57. Judge Nanette Dembitz of the New York City Family Court has stated: "In the absence of a reliable [parental] admission, it can only rarely be proved with a reasonable degree of certainty that serious injury was inflicted nonaccidentally on a child by his parent." Dembitz, *Child Abuse and the Law—Fact and Fiction*, 24 RECORD OF N.Y.C.B.A. 613, 616 (1969).

58. If the doctrinal barrier between ordinary equal protection and fundamental right analysis can be passed for these laws, the court rule that precise correlation between the end sought and the means chosen could readily invalidate both their loose procedures and their loose substantive formulations. The fundamental rights analysis would, notwithstanding occasional court protestations to the contrary, override the state's quite reasonable objection that this looseness is a necessary precondition to any sensible attack on the core of the problem of protecting neglected or abused children. Compare *United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

in 1969 and 1970. In March, 1969, New York newspapers reported that a three-year old girl, Roxanne Felumero, found dead and badly bruised, had been the subject of Family Court proceedings for alleged parental abuse and had been released in her parents' custody only two months earlier.⁵⁹ Though the news accounts of the prior court involvement were apparently mistaken,⁶⁰ the New York legislature responded to the great public outcry by rapidly enacting a new child abuse law. Less than a month after Roxanne's death, the Governor had signed the new law. The notable provisions were these. After a finding that a child was "abused," the court was required to "enter an order directing the removal of such child from his home."⁶¹ A child was to be judged abused either if he "had serious physical or mental injury inflicted upon him by other than accidental means" or if he were "in the care and custody of a parent or other person who has been adjudicated a narcotic addict."⁶² The prior statute providing that a child involved in neglect or abuse proceedings would be represented by an appointed Law Guardian (unless retained counsel appeared on behalf of the child) was replaced by a new provision that the allegedly abused child would be represented "during all stages of the proceedings by a police attorney" if the proceedings took place in New York City and by a district attorney if they occurred outside the city.⁶³ In short, the legislature intended to remove significant parts of the wide-ranging discretion that had traditionally been given the Family Court in adjudicating when a child should be considered "abused" and determining what disposi-

59. See generally 24 RECORD OF N.Y.C.B.A. 347 (1969); N.Y. Times, March 29, 1969, § 1, at 36, col. 3.

60. Following an investigation of the case, an internal disciplinary committee of the New York court system concluded that the Family Court had been justified in its refusal to remove Roxanne from her parents' custody because, contrary to newspaper reports, the social agencies appearing before the court did not recommend home removal, and

when the matter was before the court . . . there was no indication that the girl would be the victim of such a vicious crime. . . . [The Family Court] judge was unaware of the living conditions in the [parents'] home.

The committee continued:

While an abundance of evidence actually existed in the community which would have demonstrated the necessity of removing the child from her home no attempt to obtain that information had ever been made by the social agencies and consequently it was not known to [the court].

REPORT OF JUDICIARY RELATIONS COMM. OF THE FIRST DEPT., in 1 N.Y.L.J. July 1, 1969, at 4.

61. Law of April 28, 1969, ch. 264, § 1022, [1969] McKinneys N.Y. Laws 366 (repealed 1970).

62. Law of April 28, 1969, ch. 264, § 1012, [1969] McKinneys N.Y. Laws 363-64 (repealed 1970).

63. Law of April 28, 1969, ch. 264, § 1016, [1969] McKinneys N.Y. Laws 364 (repealed 1970).

tion should then be made of the child. There could be no clearer legislative choice of priority between the interests of children and their parents, as the legislature perceived those conflicting interests.

By May 1970, this new law had been repealed and essentially all of the discretion traditionally delegated to the Family Court had been returned to it.⁶⁴ In the interim, that court had struggled manfully to avoid the statutory rule that every "adjudicated narcotic addict" must, by virtue of that status alone, lose custody of his children.⁶⁵ The professional fraternities of lawyers and social workers most directly involved in the operations of the Family Court had complained extensively of misconceptions in the new law. The Family Court and Family Law Committee of the Association of the Bar of the City of New York was particularly critical of the new law on the following grounds:

The new law is an extreme example of overreaction to a sensational case and should never have been passed or approved. . . .

The new law ignores the basic problem in dealing adequately with child abuse cases. This problem is the lack of adequate courtrooms, staff and placement and treatment facilities which are necessary for any serious effort to reduce the problem of the battered child in our society. Some of the requirements of the new law will require expenditure of funds, yet the new law makes no appropriation for the same. An example is the new Section . . . requiring removal of an abused child from the home.⁶⁶

The 1969 New York law obviously was intended to reduce the role of individualized judgments regarding the need for removal of children from their homes. A powerful argument can be mounted that the 1969 rule that an "adjudicated narcotics addict" must lose custody of his child is unconstitutional:⁶⁷ not all addicts are, by that status alone, obviously unfit to raise children, and the low quality of alternative placements for most (if not all) children clearly shows that the provision sweeps more broadly than can comfortably be justified. But the question remains: What is the margin of error within which the legislature is entitled to act in protecting children?

64. An Act to Amend the Family Court Act, May 1, 1970, ch. 962, [1970] McKinneys N.Y. Laws 2031-53 (codified in various sections of N.Y. FAMILY Ct. ACT).

65. See *In re John Children*, 61 Misc. 2d 347, 306 N.Y.S.2d 797 (Family Ct. 1969).

66. Comm. on the Family Court & Family Law, *The Enactment of the Abused Child Law and Committee Findings as to Defects in the Law* (Laws 1969, c. 264), 24 RECORD OF THE N.Y.C.B.A. 347, 354 (1969).

67. Judge Midonick suggested that such a reading of the statute would "rais[e] serious doubt of constitutional defect." *In re John Children*, 61 Misc. 2d 347, 364, 306 N.Y.S.2d 797, 815 (Family Ct. 1969).

If it is obvious that this rule will apply to many children who need not, and should not, be removed from their homes notwithstanding parental narcotics addiction, it is equally obvious that in many cases parental narcotics addiction will significantly interfere with the parents' child-rearing capacities, and that at least some risk of this eventuality is present in all cases. Is it constitutionally mandated that, where there is doubt, the law must presume that children will *not* be hurt when they are living with parents who are narcotic addicts? Can a court comfortably conclude that under this rule of automatic removal more children will be hurt than will be helped? If the most a court can say is that wrongful and helpful interventions will be worked in random fashion, that would mean that benefit would result over the long haul in half the cases adjudicated. Is that too low an assurance to be constitutionally acceptable?

Two ways appear to beckon to resolve this argument. One is to assert that it is unquestionably the case that most children will be best served by remaining with their parents no matter what the family situation, and that any judgment that does not strongly presume against removal is thus necessarily irrational. By this standard, automatic removal, as under the 1969 New York law, is clearly wrong. But this standard is not clearly right. The desirability of removing a child from his home depends on a complex calculus, and to the extent that the Constitution intrudes to dictate the manner in which this calculus can be carried out—for example, by mandating a “presumption against removal” in all cases—it can obstruct the ease and/or the precision with which that calculus is made.

The second approach is to assert that the Constitution commands—not for rationality alone, but to honor “fundamental values”—that the state employ presumptions in favor of natural parents' retaining custody of their children. Such a constitutional right is, of course, a judicial *ipse dixit*, but it does correspond to an emotion widely felt in our society. Nevertheless, its applicability in this context, or indeed in any context, is problematic. The progenitor of the principle, *Meyer v. Nebraska*,⁶⁸ indicated that the right to rear one's children as one chose did not extend to permitting acts “harmful” to children.⁶⁹ As examples of this excepted category, the Court cited noncompliance with state laws for compulsory school attendance or for study of particular curricular subjects.⁷⁰

The standard that the *Meyer* Court had in mind to distinguish

68. 262 U.S. 390 (1923).

69. 262 U.S. at 403.

70. 262 U.S. at 402.

harmful from nonharmful parental conduct is obscure. The Court reached the conclusion, with puzzling ease, that a state law requiring elementary school children (including in particular those from non-English speaking homes) to be educated exclusively in English during school hours was not a reasonable prophylactic against the harm of child-rearing practices that isolate children from ready participation in the broader community.⁷¹ But there were important cultural values at stake (which touch the freedom to learn and to express oneself, as the Supreme Court has recently reinterpreted *Meyer*)⁷² in preserving opportunity for parents to decide what language shall be taught their children. The *Meyer* Court could reasonably see those cultural values under attack as such in a midwestern state with a sizeable German-speaking population immediately following World War I. Are there similar values at issue in the 1969 New York rule that narcotics addicts are unfit to have custody of children? Can a court as easily conclude that parental addiction is as little harmful to children as parental desire that children be schooled in a foreign language?

Meyer has continuing vitality in the jurisprudence of the modern Court, and the catch-phrase that, irrespective of parental shortcomings, the parent-child relationship is constitutionally protected, as "sacred" in its inviolacy as the marriage relationship,⁷³ does resonate deeply. If this relationship can be characterized as warranting the protection that the Court offers other "fundamental rights," the Court could properly overturn the 1969 New York law. Even the 1970 law would be vulnerable to such an attack because of its many opportunities for "bias" and "whim" to influence judgment, derived from the absence of precisely formulated rationales for state action in individual cases⁷⁴—and this is the essence of the administration of child abuse and neglect laws in every state.⁷⁵

In final analysis, however, there is no compelling logic that would resolve this argument. Child abuse and neglect laws touch values toward which the Court has traditionally been solicitous. The closeness

71. Justice Holmes dissented in *Meyer*, on the ground that "it is desirable that all citizens of the United States should speak a common tongue . . . [and the means chosen by the state to achieve this end] present a question upon which men reasonably might differ." 262 U.S. at 412.

72. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 508, 511 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) ("[W]e reaffirm the principle of the . . . *Meyer* case.").

73. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

74. See Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

75. See text accompanying note 53 *supra*.

of the criminal analogue in the operation of these laws and the hal-
lowed status of the parent-child relation in our society cannot easily
be overlooked. But neither can the Court ignore the potential for
deeply hurtful abuse of authority of parent over child that our root-
less, anomic society most particularly affords. In this argument, *Wy-*
man looks to one direction, *Gault* to the other. Neither posture is a
priori compelling.

But if it is therefore equally proper in constitutional logic for the
Court to adopt either approach, it is equally improper that either be
adopted. If we are reasoning circularly, we are in a circle. Thus the
Court can do nothing more than seek a resolution of the competing
arguments that, to the greatest degree possible, avoids totally sub-
ordinating one principle to the other and instead, to the greatest
degree possible, works an accommodation of both.

The Court must attempt to accommodate its interests in protect-
ing traditional constitutional concerns in traditional fashion—by
insisting on precise individualized judgments of the need for state
intervention—with competing legislative interests that legitimately
argue against such attempts at precision. A closer examination of the
operation of child abuse and neglect laws suggests some guidelines
for this accommodation. For this purpose, it will be useful to return
to the New York legislature's experiences in 1969 and 1970, and to
indulge some speculations about the psychological dynamics of those
experiences.

Enactment of the 1969 law, which boldly swept "abused" children
from their "abusing" parents, might appear dramatically to reflect
a "rescue fantasy" against which it is commonplace (though often
ineffective) to warn individual caseworkers and judges who deal with
abuse and neglect cases. John Bowlby in his classic work on separat-
ing children from parents characterized this fantasy as follows:

[S]o long as caseworkers do not know the limitations [in removing
children from their homes for whatever reason], but live, as some do,
in the sentimental glamour of saving neglected children from wicked
parents, they will act impetuously in relieving parents of their re-
sponsibilities and, by their actions, convey to the parents the belief
that the child is far better off in the care of others. Only if the case-
worker is mature enough and trained enough to respect even bad
parents and to balance the less-evident long-term considerations
against the manifest and perhaps urgent short-term ones, will she
help the parents themselves and do a good turn to the child.⁷⁶

76. J. BOWLBY, *supra* note 55, at 140.

One important explanation why "rescue" of the child from his "bad" parents may be no help at all to the child was stated this way:

The attachment of children to parents who, by all ordinary standards, are very bad is a never-ceasing source of wonder to those who seek to help them. Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-treated, and keenly resent criticisms directed against their parents. Efforts made to "save" the child from his bad surroundings and to give him new standards are commonly of no avail, since it is his own parents who, for good or ill, he values and with whom he is identified. (This is a fact of critical importance when considering how best to help children who are living in intolerable conditions.)⁷⁷

But just as it was difficult for the New York legislature, and for individual judges and caseworkers, to perceive the depth of attachment that a child can feel toward very bad parents, it may be equally difficult for them to acknowledge that some, or any, parents are in fact very bad toward their children. In some ways, the rapid retreat of the New York legislature in 1970 from its adamant stance of 1969 that hurt children should be taken posthaste from bad parents mirrors a common state response to individual neglect and abuse cases: swift, indiscriminate removal of an apparently wronged child from his parents, followed after some official dallying and confusion by a return to the *status quo ante*, with at least some of the participants in the events sadder, but not wiser.⁷⁸

The reasons for possible misperceptions are clear, whether these misperceptions are an inappropriate "rescue fantasy" or a persistent refusal to accept the stark reality that a particular child must be removed from his parent. Though the explanation is readily accessible from common sense, approaching the matter through psychiatric terminology will be helpful. In psychiatric parlance, the explanation for these potential misperceptions is termed "counter-transference." In the context in which it was developed, this concept refers to the unconsciously derived attitudes and identifications that

77. *Id.* at 80.

78. See Terr & Watson, *supra* note 55. A recent report by the New York State Board of Social Welfare suggests the typicality of this pattern in New York City foster-care services: "The fact that over half of the children discharged from care return to their own families or relatives suggests that many of them might have been cared for at home at great savings, without intervening foster care." N.Y. Times, May 16, 1971, § 1, at 57, col. 1. The fact noted by the Board holds true according to a recent survey whether the child was placed in foster care by court action or by the city Bureau of Child Welfare. Fanshel, *The Exit of Children from Foster Care: An Interim Research Report*, CHILD WELFARE, Feb. 1971, at 65, 71.

a therapist projects onto his patient.⁷⁹ It is the natural and inescapable counterpart to the unconscious projections of the patient onto the therapist, and, indeed, this process of transference/counter-transference is simply a way of describing an important aspect of all human interactions. For psychoanalysis the transference concept has basic importance because it is the patient's transferences onto the therapist that become the central focus of the therapeutic process. Through identification and rational exploration of that transference, the patient is brought to see the role that his unconscious is playing in affecting his everyday behavior, and the unconsciously motivated behavior thereby becomes accessible to modification. But unless the therapist's own unconscious processes engaged by the patient's personality and behavior are rationally accessible to the therapist, that is, unless the therapist can rationally scrutinize his counter-transferences, his perceptions of the patient will be hopelessly clouded by the interweavings of his own projections with the reality presented by the patient. The therapist would be thereby disabled from sensibly diagnosing and pursuing a fruitful treatment strategy for his patient.

The problems of counter-transference can be similarly disabling for sensible judicial response to child abuse and neglect cases. A judge's desire to punish the parents and remove their child from home, when he believes they have acted (and when in fact they have acted) hurtfully toward the child, can be as much, or more, a product of the judge's unconscious identifications in the transaction as it is his reasoned response that this child will best be helped by removal from these particular parents. Similarly, the judge's convictions that this child should not be removed from these parents can be a reaction more to his unconscious identifications than to the reality presented by the abusing family. This situation has been described, from a psychiatrist's perspective, in this way:

Probably the first difficulty met by the therapist is the management of his own feelings about a parent who has hurt a small baby. Most people react with disbelief and denial, or on the other hand, with horror and a surge of anger toward the abuser. . . . [The therapist must] gain a more useful, neutral position. . . .⁸⁰

The capacity to gain this "more useful, neutral position"—that

79. See generally excerpts from A. FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1936), in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 144-47 (1967) [hereinafter KATZ]; excerpts from Gil, *Psychoanalysis and Exploratory Psychotherapy*, in KATZ, *supra* at 669-71; Schafer, *On the Nature of the Therapeutic Relationship*, in KATZ, *supra* at 722-24.

80. Steele & Pollock, *supra* note 55, at 138.

is, to scrutinize and factor out the counter-transference—is a hard-won therapeutic skill.⁸¹ It cannot be expected that most, or even many, of the judges and court-affiliated personnel charged with the administration of child abuse and neglect laws will have developed this skill. Yet without this capability, the prospects that any given judge will respond to an abusing family in a way that will accurately account for the child's needs and interests is at best wholly random, wholly dependent on the chance that this judge's unconsciously motivated perceptions happen to coincide with the real situation of the family before him.

If it is important and properly a constitutional concern—which, within limits, it is—to combat the possibility that state officials will misperceive the need for intervention, there is one constitutional right that the Court might fruitfully apply to this purpose. The Court could assert that the parents of an allegedly abused or neglected child have a right to retained or appointed counsel. Parental counsel would promise to be one clear voice in the proceedings with an unalloyed interest in opposing any state intervention. In essence, this voice would combat transference-derived fantasies that home-removal is appropriate, and would thus work to bring therapeutic self-awareness to court personnel by insisting on the need to attend to the reality of the case at hand.

In some states, as noted earlier, counsel is appointed to represent the child in these proceedings.⁸² But this role as spokesman for the "child's interest" forces counsel to resolve for himself—possibly in a manner dominated by his own unconscious processes—whether the child's interest points to or away from removal from the home.

81.

What helps the analyst maintain an adequate degree of neutrality and balance? I do not pretend to offer a complete answer to this question but mention only a handful of salient factors. There is his intelligence and especially his common sense about people that enable him to appreciate the complexity of human experience and to keep his bearings in the face of it. There is his capacity for sublimated interest in the emotional lives of other persons. There is his belief in the unconscious which enables him to take strong emotions as partial and often direct expressions of processes going on beneath the surface. There is his personal analysis which increases his understanding of himself and fortifies his emotional stability so that he is not vulnerable to every passing reaction to him and not itching to form transferences of his own. Then there is the factor of his leading a personal life of his own that is sufficiently satisfying that he is not dependent on his patients for direct, nonprofessional gratifications. Also, his experience with patients teaches him that much of the time the feelings they have about him have little objective foundation and may change drastically even from one moment to the next. His formal training is another help, for he learns from it, among other things, how to recognize, investigate and understand emotions directed at his person or behavior as analyst. Finally there are his ethical sense and his ideals which are expressed in his respecting his patient and his keeping a watchful eye on his own frailties and self-indulgent tendencies.

Schafer, *On the Nature of the Therapeutic Relationship*, in KATZ, *supra* note 79, at 723.

82. See note 36 *supra*.

Counsel for the child is thus of no predictable assistance in forcing the administering court to confront and sort out its real as against its fantasy urgings for intervention to help the child.

It is, of course, true that parental counsel's insistent presence will serve to reinforce a court's fantasy, as opposed to real, convictions that no intervention is necessary. But if the judge or administering personnel are thus inclined, it seems likely that they will find reasons for nonintervention even without counsel to suggest them. Thus, it can be reasonably concluded, the presence of parental counsel would materially advance the constitutionally derived concern that an individualized, relatively precise judgment precede the removal of a child from his parents, without unduly jeopardizing a quite reasonable contrary concern that removal might be inappropriately denied because courts may deny the reality of risks of harm to the child. Additionally, in order to avoid reinforcing this inappropriate denial of the need for intervention by administering officials, the parental right to counsel might be held subject to waiver, although an excellent argument can be made against permitting waiver of counsel in these proceedings.⁸³

In short, the presence of parental counsel would be intended to guard against misperceptions by administering officials. It is, however, possible that counsel's presence might work to forestall those officials from acting on wholly adequate perceptions of the need for intervention to protect the child, or that counsel might serve to withhold information that would otherwise be available and on which officials might base an adequate judgment for intervention. Although this is a legitimate concern, the Court is entitled to require that it be met by provisions carefully tailored to deal with it. To require that counsel be completely excluded is to insist that the Court unduly sacrifice its constitutionally derived interests in these proceedings.

The legitimate legislative interest in pressing administering officials to identify and protect needy children can, however, to a substantial degree be vindicated by ensuring that those officials have ready access to a wide range of information about the child and his family. As indicated, the presence of a parental advocate might be expected to combat the punitive fantasies that can lead to inappropriate removal of a particular child from his parents. But the presence of extensive information about the child and his family might

83. See discussion regarding waiver of rights in juvenile delinquency proceedings in text accompanying note 123 *infra*, and regarding welfare home visits in text accompanying note 145 *infra*.

be expected to combat the wishful denials of some officials that parents are ever bad to their children. The most sensible accommodation of competing judicial and legislative concerns in the administration of child abuse and neglect laws would be to ensure that any decision to intervene in family life is preceded by searching scrutiny, and that extensive information about the family is available to administering officials by which they might see whether intervention is needed.

For this reason, it would be inappropriate to extend the self-incrimination right to parents alleged to have abused or neglected their children, when the purpose of the inquiry is to decide whether the child must be protected from the parent by removal from the home or by other means.⁸⁴ Rather, administrative officials must be free both to insist that parents speak fully about their relations with the child and to draw appropriate negative inferences from parental resistance to such disclosures. On this ground, it would also be improper to apply stringent "probable cause" standards as a prerequisite to medical examinations of the child or his parents. Particularly when dealing with younger children, and most emphatically when dealing with preverbal children, there are staggering evidentiary problems in distinguishing between those physical or emotional conditions of the child that do and those that do not indicate a serious impairment of parent-child relations.⁸⁵ Is this child's skull fracture accidental, as his parents now insist, or was it inflicted by parental beatings? Is this child's apparently disturbed behavior the precursor of a full-blown psychopathology that requires intervention into family interactions as early as possible, or is this behavior an attribute of a developmental process that will yield to "the self-healing qualities of further development"?⁸⁶ To make these distinctions in individual cases can be a complex and difficult task, even if the diagnostician has access to all conceivable information about the child's developmental history and his family's interactions with him. But without access to such information, differential diagnosis is impossible.

84. Self-incrimination rights, and the entire panoply of criminal safeguards, should obviously apply in criminal prosecutions brought against parents for allegedly mistreating their children. Criminal "cruelty to children" statutes in particular are typically designed so that loss of child custody and application of criminal sanctions could follow from the same findings of fact. Child neglect statutes leading to custody loss or some other intervention into family life are, however, typically framed more broadly than the criminal proscriptions. See Paulsen, *supra* note 48, at 680-86, 693-703.

85. See Dembitz, *supra* note 57.

86. Ernest Kris, cited by A. Freud in *Child Observation and Prediction of Development*, 13 *PSYCHOANALYTIC STUDY OF THE CHILD* 92, 98 (1958).

It is true that further development of the child will necessarily reveal what the presenting symptom foretold. But if the child's skull fracture was a symptom of a pattern of parental abuse, we can hardly afford to wait for confirmation if we hope effectively to protect the child. Or if the child's odd behavior is a precursor of more obvious psychopathology, early intervention is equally essential to assure the possibility of successful treatment.⁸⁷ Anna Freud correctly warns that "as knowledge stands at present, it is difficult to draw the line between prediction of pathology based on authentic danger signals, and a diffuse and indiscriminate over-anxiousness, all too easily aroused by every slight deviation from the optimal and from the

87. Anna Freud graphically makes this point:

It is easier, therapeutically, to intervene in a process of symptom formation in the fluid state than to deal with hardened symptoms. There is no child analyst, I believe, who would not welcome the next step forward to a state of affairs which places therapeutic intervention even earlier, namely at time before symptom formation has been resorted to at all.

To mention [one] example . . . of my own experience . . . I had the opportunity, several years ago, to meet with a small boy's *facial tic*, one or two days after its appearance, to guess its meaning, and to dissolve it almost immediately by means of analytic interpretation. In this intervention I was guided, not only by the clinical data provided by the child, but by the lucky chance of an additional "longitudinal" observation of his life history. He was one of the former war children whose family fortunes and misfortunes I had followed from a near distance. I knew about his intimacy with his mother in infancy when he was alone with her; his unrelenting hostility against his father when he returned, injured, from the war; his immense jealousy when a sibling was born; and his complete lack of manifest affect when his mother fell ill and died in connection with her next pregnancy. The tic appeared a year after his mother's death, at the age of six, following a slight nosebleed. It was two-timed and consisted of a quick sniffing up and blowing down through the nostrils, repeated at short intervals.

It seemed legitimate to me to combine past and present information for the purpose of analytic action. There seemed no doubt that the tic represented the culmination and attempted solution of many conflicts of his past history: fear of injury to his body, heightened by the death wishes against father and sibling, now turned against himself; his unconscious strivings for femininity and the fear of them; his resentment about being neglected and "rejected" by the mother; his taking upon himself the mother's role in stopping the bleeding (by sniffing up) and testing the result again and again for reassurance (by blowing down). It was this latter meaning, I believe, which determined the selection of the symptom. The child had withdrawn libido from the object world, following his threefold disappointment in the mother (return of father, arrival of sibling, her death), and had cathected his own body instead, thereby giving inflated, hypochondriacal importance to his body ailments. His tic represented a pathological way of playing mother-and-child with his own body; he took over the role of mother in a comforting and reassuring capacity, while his body represented himself in the role of the frightened and suffering child.

....

Was it really necessary to let this child wait for help until there was a manifest outbreak of pathology in the form of symptom formation? Is this not one of those typical sequences which, according to our knowledge of life histories, would bound to lead to pathology? Could we not have spotted pathology in this case "before it appeared," merely . . . "from the child's behavior, from that of the family unit, from the history of the child and mother"? There is only disadvantage . . . in waiting with therapy until the whole host of conflicting ideas and impulses in the child are compressed into a symptom, and moreover one which is notoriously difficult to remove by analysis once it has established itself and been allowed to persist for any length of time.

Id. at 99-100.

norm.”⁸⁸ The personnel who administer child abuse and neglect laws are even more likely than Miss Freud to have difficulty drawing this line. But these difficulties do not justify withholding from diagnostic personnel access to information upon which informed judgments might be based. It is tempting to forbid access to information as a prophylaxis against possible (or even probable) misuse of that information. But to embrace this rule as a constitutional principle is to deny the possibility that the child-protective agencies can ever improve their capacities to match performance with promise. To embrace this rule as a constitutional principle would meet the Court’s concern to protect traditional values, but it would unduly subordinate the legitimate interests expressed in the competing legislative judgment favoring early intervention to protect children.⁸⁹

The accommodation urged here—that widest access to information be assured to assist in identifying child abuse or neglect, but that rigorous scrutiny be directed to any conclusions derived from that information, in part by assuring the active participation of parental counsel—might appear to be in conflict when a court must consider what kind of confrontation rights should be afforded in abuse or neglect proceedings. Two objections can be raised against the proposition that all witnesses favoring state intervention must testify in open court and be fully available for cross-examination. First, it can be argued that confidentiality must be guaranteed in order to assure either that private citizens will readily report child abuse or neglect incidents or that professional personnel will speak and write freely about the case. But such speculative gains from assuring anonymity, particularly considered against the substantial likelihood that anonymity often will merely mask spitefulness or incompetence, are clearly outweighed by the interest in full examination of the bases of any judgment removing a child from his parents or otherwise significantly intervening in his family.

88. *Id.* at 103.

89. To insist that probable cause showings need not precede information searches, such as compulsory medical examinations, does not, of course, mean that prior judicial approval of such searches should not be required. To the contrary, a warrant procedure, using a “reasonableness” standard, is essential to protect parents and children against purposeless invasions of privacy. Compare *In re Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (Family Ct. 1968), in which Judge Dembitz properly refused to find neglect based on parental refusal to accept psychiatric examination of an eight year old girl, who had originally been reported by hospital authorities as an “abused child,” on suspicion that she had been sexually molested. Notwithstanding virtually conclusive medical findings that the apparent evidence of molestation was merely an internally-caused vaginal bleeding, the New York City Bureau of Child Welfare sought a compulsory psychiatric examination of the girl and her older sister and brother apparently further to explore whether the child had been molested.

Second, it can be argued that public exposure of medical or psychiatric data might interfere with the prospects for subsequent treatment of the child or his parents. This is a substantial concern, but it can be accommodated on a case-by-case basis by insisting that a court be clearly convinced of the reality of therapeutic needs for nondisclosure.⁹⁰ The general rule should, however, favor application of the constitutional right to full confrontation in open court.

Confrontation should be provided at both the adjudicative and dispositional stages of child abuse and neglect proceedings. The constitutional confrontation guarantees as applied in criminal proceedings are at present limited to the "adjudicative" trial and have not yet been extended to sentencing proceedings, to assure access, for example, to presentence reports.⁹¹ This limitation in criminal proceedings is based on the logic, however flawed, that an adjudication that a person has committed a criminal act renders him subject to whatever various purposes—punishment, deterrence, rehabilitation—the state might see fit to pursue. But for child abuse and neglect proceedings, it is inconsistent with the internal logic of the state laws completely to compartmentalize adjudication and disposition. The professed state purpose in these laws is to protect the child. That purpose cannot be implemented unless the state can comparatively evaluate the parental misconduct and its potential harmfulness to the child with the available dispositional alternatives and their potential harmfulness to the child. The unanimous outcry against, and the rapid abandonment of, the 1969 New York heresy, which automatically linked home removal with a finding of parental misconduct, demonstrates that state laws generally accept this theoretical premise (though they do not always put it into effective operation). The state abuse and neglect laws should be taken at face value on this matter, and should thus not be permitted to distinguish between adjudication and disposition proceedings for purposes of applying confrontation rights.

Two additional matters must be considered. First, though the civil standard of proof is applied by many states in child abuse and neglect proceedings, the argument for the application of the criminal "beyond reasonable doubt" standard can readily be drawn from the preceding discussion. The argument draws persuasiveness not merely from the proximity of the criminal law analogues to these proceedings. Since the "reasonable-doubt standard . . . 'impresses on the

90. See *In re Blaine*, 54 Misc. 2d 248, 282 N.Y.S.2d 359 (Family Ct. 1967).

91. See generally F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 699-710 (1969).

trier . . . the necessity of reaching a subjective state of certitude . . . ,"⁹² that standard would aid the Court in accomplishing its purpose in insisting that rigorous scrutiny be directed to any compulsory interventions into family processes responding to child abuse or neglect. This question is, however, a close one. In criminal prosecutions, the reasonable-doubt standard typically is seen to apply to factual adjudications. Although the criminal standard has recently been extended to juvenile court proceedings, it was apparently limited to "the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."⁹³ There are, of course, factual disputes in the application of child abuse and neglect laws. But particularly in neglect cases, an interpretive evaluation regarding the psychological significance to the child of the "neglecting acts" proved is an essential step in the adjudication.⁹⁴ Thus it may seem misleading, and demanding a false certainty, to insist that child abuse and neglect laws be applied with the same standard of proof that adheres for "pure fact" adjudications. But there are many such "impure fact" adjudications in the criminal law lexicon—distinguishing, for example, between degrees of crime based on whether "premeditation" exists, which must be judged "beyond a reasonable doubt." Imprecise as such an instruction might seem to the administrators of child abuse and neglect laws, the instruction nonetheless would appear a salutary exhortation to assure close scrutiny of these cases. By its very imprecision the instruction would likely work little interference in the legitimate operations of those laws.⁹⁵

Second, there are few practical protections to assure that children will remain free from state custody prior to an abuse or neglect adjudication. A large number of public officials and private persons are authorized and even encouraged under state laws to remove children from their homes until a court determines whether they

92. *In re Winship*, 397 U.S. 358, 364 (1970), quoting Dorsen & Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAMILY L.Q., Oct. 1967, at 26.

93. *In re Winship*, 397 U.S. 358, 364 (1970). See discussion in note 26 *supra*.

94. The Standard Juvenile Court Act, promulgated by the National Probation and Parole Association, provides that the juvenile court has jurisdiction over any child "whose environment is injurious to his welfare." STANDARD JUVENILE COURT ACT § 8(2)-(b) (1959). The "neglect" formulations in typical state statutes are similarly open-textured. See Paulsen, *supra* note 48, at 693-94.

95. In imposing the criminal proof standard in juvenile proceedings, the Supreme Court noted the concession of the juvenile court officials that "use of the reasonable doubt standard probably would not have a serious impact if all that resulted would be a change in the quantum of proof." *In re Winship*, 397 U.S. 358, 366 n.4 (1970) (citing appellee's brief).

have been abused or neglected.⁹⁶ But such provisions for pretrial custody in abuse and neglect laws cannot be overturned simply because custody precedes the trial, for there can often be crucially important reasons for swift removal to ensure the safety of children. Unless a variety of people are authorized to remove such children—and encouraged to do so, for example, by immunity from subsequent civil liability for “good faith” actions⁹⁷—natural reluctance to interfere with parent-child relationships might predominate to the marked disadvantage of many children. Therefore, rather than attacking such “pretrial custody” wholesale, the legislature and the courts should work to ensure speedy and automatic review of all such preliminary actions.⁹⁸ Indeed, it is not clear that the Constitution demands more than this, even for pretrial release in criminal proceedings.⁹⁹

III. PROTECTING CHILDREN FROM THEMSELVES:

GAULT RE-EXAMINED

To this point, *Gault* and *Wyman*, when applied to child abuse and neglect laws, have been treated as polar instructions. The preceding discussion of these laws can rest on the premise that both *Gault* and *Wyman* were correctly decided in their contexts, but that child abuse and neglect laws straddle both. It can be argued that, like the delinquency laws in *Gault*, but unlike the welfare laws in *Wyman*, these laws threaten parents with grave sanctions—loss of their children and stigmatization as “bad parents”; but like the laws in *Wyman*, and unlike those in *Gault*, the purpose of these laws is to protect children from their parents rather than to protect society at large from random antisocial acts. Thus, it might appear that the analytic justification for applying some but not all criminal protections to child abuse and neglect proceedings follows from the strength of both competing characterizations.

But this argument is too glib. *Gault's* context, in particular, cannot be tidily distinguished from child-protective legislation by asserting that the predominant purpose of the juvenile laws is to protect

96. See note 37 *supra*. The New York statute, for example, provides that “emergency” removal or detention from parental custody may be carried out, without prior court authorization, by a “peace officer, or an agent of a duly incorporated society for the prevention of cruelty to children or a designated employee of a city or county department of social services . . . or any physician treating such child.” N.Y. FAMILY CT. ACT § 1024(a) (McKinney 1963).

97. See, e.g., N.Y. FAMILY CT. ACT § 1024(c) (McKinney 1963).

98. See, e.g., N.Y. FAMILY CT. ACT § 1027 (McKinney 1963).

99. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

the community against delinquent acts, as opposed to protecting the juvenile against his parents or even against himself. There are differences between child abuse and neglect laws and delinquency laws. In the latter, there is typically not a clearly drawn contest between parents and state agencies regarding the welfare of a child unable effectively to protect himself against either his parents or the state. In child abuse and neglect laws, both parents and the state can reasonably claim to act as surrogate for the child's best interest, and the child cannot be expected to exercise independent judgment in choosing between competing versions of his interests.

But there are compelling similarities between neglect laws and delinquency laws in their operational contexts. There is, first of all, considerable overlap between them in terms of the coercive jurisdiction each confers. The same acts that establish a delinquency adjudication can also quite readily establish parental neglect, essentially for failure to exercise proper guidance and control as evidenced by the child's delinquent actions.¹⁰⁰ The juvenile can thus be placed in the state's custody either as a "delinquent" or as a "neglected" child. And if, for example, a child must be given self-incrimination rights to protect himself against state coercion for delinquent acts, he must equally be shielded from "self-incrimination" in the operation of neglect and abuse laws that simply overlap delinquency laws. But if the criminal self-incrimination rights for the child are carried wholesale into abuse and neglect proceedings and are accompanied by the ordinary rule that any waiver must be "knowing and intelligent,"¹⁰¹ it is evident that court personnel could never interview a young child alleged to be neglected or abused. This consequence inappropriately constricts legitimate state policy. Too much information, needed to protect the child, would be withheld from the state. This is the same reason that led to the earlier conclusion that the self-incrimination right should be withheld from parents in neglect or abuse proceedings in which child custody alone was at issue.¹⁰²

There is a further related reason that the self-incrimination right should not be granted to young children in child abuse or neglect proceedings. The right should be withheld not because there is no "sanction" or "stigma" at stake for the child in these proceedings; as noted earlier,¹⁰³ from the child's perspective, at least, the "remedy"

100. See notes 27 & 94 *supra*.

101. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

102. See text accompanying note 84 *supra*.

103. See text accompanying note 45 *supra*.

of removal from his parents, however bad they may be, can quite readily appear as a desperately harsh punishment. The right should be withheld, rather, because the child cannot be expected to have sufficient capacity to choose between his loyalties to his parents and his personal need to be free from their mistreatment. The purpose of state intervention must be, first, to determine whether the child does in fact need to be free and, if so, then to help him successfully get free. For this purpose, state officials must have access to the child, both to permit and to support disloyalty to his parents when such disloyalty is necessary for the child's good. A preschool child, in particular, is peculiarly incapacitated to free himself from belief in his parents' omnipotence. He is both psychologically and practically utterly dependent (though not without influence within the family).¹⁰⁴ For this reason, it would be wrong to insist as a matter of constitutional principle that the preschool child be given some independent role in withholding permission from the state to intervene in his life for his welfare. The grant of such independent role, as

104. Compare Anna Freud's discussion of this issue as it affects therapeutic strategies in treating young children:

Some of the most lively controversies concerning the specificity of child analysis are related to the question whether and how far parents should be included in the therapeutic process. Although this is overtly a technical point, the issue at stake is a theoretical one, namely, the decision whether and from which point onward a child should cease to be considered as a product of and dependent on his family and should be given the status of a separate entity, a psychic structure in its own right.

.....

As regards the patient's developmental status, i.e., the steps taken by him toward attaining individuality, it is essential for the analyst to realize in which of the vital respects the child leans on the parents and how far he has outgrown them. Whether the *state of his dependency*, or independence, is in accordance with his chronological age can be assessed approximately from the following uses a child makes consecutively of the parents:

- for narcissistic unity with a motherly figure, at the age when no distinction is made between self and environment;
- for leaning on their capacity to understand and manipulate external conditions so that body needs and drive derivatives can be satisfied;
- as figures in the external world to whom initially narcissistic libido can be attached and where it can be converted into object libido;
- to act as limiting agents to drive satisfaction, thereby initiating the child's own ego mastery of the id;
- to provide the patterns for identification which are needed for building up an independent structure.

.....

For the analyst of children . . . all the indications . . . bear . . . witness to the powerful influence of the environment. In treatment, especially the very young reveal the extent to which they are dominated by the object world, i.e., how much of their behavior and pathology is determined by environmental influences such as the parents' protective or rejecting, loving or indifferent, critical or admiring attitudes, as well as by the sexual harmony or disharmony in their married life. The child's symbolic play in the analytic session communicates not only his internal fantasies; simultaneously it is his manner of communicating current family events, such as nightly intercourse between the parents, their marital quarrels and upsets, their frustrating and anxiety-arousing actions, their abnormalities and pathological expressions.

A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD*, 43, 46, 50-51 (1965).

the *Gault* Court explicitly acknowledged, is at base the purpose of the constitutional guarantee against self-incrimination.¹⁰⁵

With increasing age and increasing experience outside the home, a child comes more realistically to understand that he need not simply be acted upon by his environment, including his parental environment, but that he can be a self-willed actor and influence in that environment. With that growing understanding comes growing capacity to make independent choices of the kind that the self-incrimination right is intended to protect. Some delinquent behavior is, however, symptomatic of disturbances in this growth process. It cannot be said that all behavior that the community regards as "delinquent" is thus symptomatic. Nor can such delinquent behavior be precisely quantified or readily identified at the moment a particular child comes to the attention of state authorities. But when delinquent behavior does connote this disturbance, it can connote an incapacity to exercise the right against self-incrimination. That is, for some young or adolescent children, delinquent behavior results from family disturbances that place the child in a bind quite similar to that which has been described for the younger child subject to abuse or neglect proceeding.¹⁰⁶

105. The *Gault* Court stated:

[T]he privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of individual and the state. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

387 U.S. at 47.

106. Compare this case described by Anna Freud, drawing generally on the work of August Aichhorn:

About two and a half years ago I made the analytical acquaintance of a difficult little girl of nearly eleven. She was from the well-to-do Viennese middle-class, but the relationships in her home were unfavourable, for her father was weak and little concerned with her, the mother had been dead for some years, and her relationship with the father's second wife and a younger stepbrother was unsatisfactory. A number of thefts by the child, and an unending series of crude lies and small and great concealments and insincerities had determined the stepmother, on the advice of the family physician, to seek the aid of analysis. Here the analytical treaty was . . . simple. "Your parents cannot do anything with you," was the basis of the negotiations, "with their help alone you will never get out of the constant scenes and conflicts. Perhaps you will try the help of a stranger." She accepted me without more ado as an ally against her parents. . . .

My next procedure in this . . . case was throughout that recommended by Aichhorn for the educational treatment of delinquent children. The probation officer entrusted with the care of such children, says Aichhorn, must first of all put himself on the side of the delinquent, and assume that the child is justified in its attitude to those about it. Only so will he succeed in working with his charge instead of against him. I might emphasize here that Aichhorn's position for this kind of work has considerable advantage over that of the analyst. He is authorized to interfere by the state or town, and he has behind him the authority of an official position. The analyst on the contrary, as the child knows, is commissioned and perhaps paid by the parents, and he always gets into an awkward position if he sets himself against his clients, even if it is in their own interest. In fact I never held the necessary consultations with the child's parents without feeling

This older child "knows" that he needs help and, in particular, that he needs release from an environment that makes intolerable demands on him; yet he cannot consciously acknowledge his need for help because the psychic cost of admitting the shortcomings of his environment, and the hurtfulness of his parents toward him, seems devastating. To give this child clear, unambiguous power to resist state intervention—a power that the right against self-incrimination is intended to confer—is often virtually to assure that neither he nor anyone else will be able to acknowledge his need for help. To give this child such power may be to abandon him to a fate that neither he nor the community wants. For this child, delinquency proceedings are as much a contest between his parents and state agencies—however muted and disguised that contest may appear for an older child himself accused of bad conduct—as are child abuse and neglect proceedings for younger children. This older child is as little able effectively to protect himself against either his parents or the state as is the younger.¹⁰⁷

This characterization does not apply to all juvenile delinquency proceedings. Before *Gault*, state agencies acted as if this were a universal description. *Gault* argued, however, that the criminal analogue was so close, and the promise of benefit so uncertain, that certain constitutional guarantees must be applied to delinquency proceedings as if children were adults. But if, in a rough way, this was *Gault's* instruction, the instruction is elusively oracular; for, even when dealing with adults, the state has reserved much power to coerce an adult for his "best interest" and to withhold constitutional protections from adults found incompetent to exercise them.¹⁰⁸

uneasy, and the analysis after some weeks, in spite of the best inherent conditions, finally came to grief on account of this unclarified relationship.
A. FREUD, *THE PSYCHOANALYTICAL TREATMENT OF CHILDREN* 9-10 (1964).

107. Jay Katz has aptly stated this concern in exploring the justification for involuntary commitment of the "mentally ill" considered "dangerous to themselves": [A]nother oft-made argument . . . asserts that no matter what the balance of instinctual and ego forces or of libidinal and destructive superego forces or of inner and outer world distortions, persons should be left to pursue their own fate if they so "state." Such a proposition can be as destructive of human life as its opposite of over-readiness to hospitalize. It is more difficult to pursue a middle ground, which seeks to take into account the complexities of conscious and unconscious dynamics and at the same time attempts to keep such judgments from running wild, but it is true to the realities of human existence and aspirations. It is always easier to cut than untie Gordian Knots. Without coercion, society will abandon many people to their self-destructive and uncared-for fate. Such an approach is as insensitive as the abuse of power that leads to indefinite incarceration without treatment and with treatments that are of no value or ineffective or even harmful. Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 770-71 (1969).

108. See generally KATZ, *supra* note 79, at 421-784, regarding civil commitments,

Unless *Gault* means that all children must be treated like adults because all adults must henceforth be treated like adults, regardless of the state's view of their capacities or need for coerced assistance, the *Gault* instruction provides little clear direction.

The technique for accommodating the competing demands of the criminal and civil procedural models, described earlier for child abuse and neglect laws, can be easily applied to justify all but one of the specific procedural rights conferred by *Gault* and its progeny. Just as in abuse and neglect laws, the *Gault* rights—appointed counsel to represent the child, clear advance notice of charges, and confrontation of all witnesses at the delinquency hearing—are essential to ensure a rigorous testing of the basis of any claim for benevolent state intervention. The recent extension of *Gault* to require proof “beyond a reasonable doubt” in delinquency proceedings¹⁰⁹ is similarly justifiable. And, for the reasons discussed regarding abuse and neglect laws, it would be wrong to limit these procedural rights to those proceedings in which the child is charged with conduct that, for an adult, would be a crime. For whatever reason the state chooses to force assistance on an unwilling juvenile, these procedural guarantees are essential to assure a reasonable likelihood that the asserted benefit will result and thus to justify the withholding of whatever other “adult” criminal procedure guarantees the state might properly consider as obstructions to its beneficial purposes.¹¹⁰

commitments for “incompetent” or “insane” criminal defendants, and impositions of various forms of involuntary guardianships on adults.

The *Gault* opinion suggests that juvenile court proceedings need not “conform with all of the requirements of a criminal trial or even of the usual administrative hearing.” 387 U.S. at 30. But the opinion failed to explain what or why criminal safeguards might properly be omitted, and the general tone of the opposition suggests that this quoted language was seen as more a palliative to conflicting views within the Court or elsewhere than as an analytic necessity. The Supreme Court has recently affirmed the proposition that juvenile courts are not constitutionally compelled to apply all adult criminal procedures, but the Court offered little guidance in the application of that proposition. See *McKeiver v. Pennsylvania*, 39 U.S.L.W. 4777 (U.S. June 21, 1971), in which the Court held that jury trials were not constitutionally required in juvenile proceedings. Justice Blackmun's plurality opinion proclaimed that “the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness.” 39 U.S.L.W. at 4782.

109. *In re Winship*, 397 U.S. 358 (1970).

110. Most notably, the open-ended reach of juvenile court substantive jurisdiction—over “incorrigibles,” “persons in need of supervision,” and so forth (see text following note 26 *supra*)—would likely be considered unconstitutionally vague if applied to adults. See *Coates v. City of Cincinnati*, 39 U.S.L.W. 4630 (U.S. June 1, 1971). But these juvenile status designations can appropriately denote need for therapeutic intervention. And even if the status designations were held invalid, the special character of the state's interest in the juvenile offender would still likely appear in different sentencing provisions applied, for example, to adult and juvenile misdemeanors. While minor property damage or personal injuries caused by an adult might be overlooked, the same conduct

However, *Gault's* bestowal of the right against self-incrimination in delinquency proceedings raises more complex questions, particularly since *Gault* insisted that *Miranda*¹¹¹ applied with full force to delinquency proceedings,¹¹² so that the right to appointed counsel comes to the juvenile at his earliest contact with state authorities. If we ignore for the moment the likely practical consequences of this bestowal of the self-incrimination right, and focus rather on the idealized imagery that shines through the Court's opinions, it appears that the juvenile will be warned at the moment state officials contact him that he need not speak and that he can have appointed counsel. If he chooses either to remain silent or to have counsel present, all further private communication between the juvenile and court personnel will end. Moreover, the slightest hesitation by the juvenile in response to the *Miranda* warnings will be construed as an invocation of the rights to silence and to an attorney.¹¹³ In short, private conversation between the juvenile and court personnel about the juvenile's alleged actions will be impossible unless eagerly initiated by the juvenile himself.

by a juvenile could sensibly be viewed as a dangerous harbinger requiring early, concentrated attention. A consistent pattern of differential dispositions between adult and juvenile offenders for the same offenses would not on its face be unjustifiable.

The Court's recent refusal to extend the jury trial guarantee to juvenile proceedings (*McKeiver v. Pennsylvania*, 39 U.S.L.W. 4777 (U.S. June 21, 1971)), can be justified on the premise that juvenile courts, or some state agency, may continue to have compelled jurisdiction over juveniles "in need of supervision" as indicated by their conduct—though not criminal by adult standards—or by their parents' neglecting or abusive conduct toward them. There are factual predicates to this judgment of need. It may be that at present most juvenile court personnel are as unknowing in making this judgment as the general population from which juries are drawn. But a jury is less likely than juvenile court personnel to be readily or efficiently educable regarding application of the diagnostic criteria relevant to establishing such need. Unless the Court is prepared to force abandonment of juvenile "status jurisdiction," it should not force juries into this diagnostic process at the option of the juvenile or his parent. And a court should not constitutionally compel abandonment of juvenile "status jurisdiction" unless it is prepared to conclude that the juvenile court process is beyond education, or that the risks of harm from relying on future educability outweigh the risks of harm to children whose need for compelled state help can only be identified by the application of these generalized diagnostic formulations. The case for either of these propositions is at least disputable.

It might nonetheless be argued that the jury right should apply when, as on the facts of *McKeiver*, a juvenile is charged with acts which would be an adult criminal offense. The argument has its attractions. But, again, if the parallel open-textured jurisdiction over "self-harmful" conduct, or parent neglect which may partly be made evident by delinquent "acting-out" conduct, is not abolished, the jury right will be easily side-stepped in practice unless it is extended to all aspects of juvenile court jurisdiction. Yet such extension seems more likely to impede than to improve sensible, reliable application of the juvenile court's "status jurisdictions."

111. *Miranda v. Arizona*, 384 U.S. 436 (1966).

112. 387 U.S. at 44, 55.

113. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

If this image were the practical reality, it would obviously be impossible for the state to make contact with, and effectively to offer assistance to, that class of juveniles described earlier as lacking the capacity for exercising the right against self-incrimination. The inability of these juveniles to acknowledge their need for release from their present environment and their incapacity to ask for help by "choosing to confess" can only be remedied by confidential, confidence-giving, prodding and thus subtly coercive conversation with empathetic, well-trained court personnel.¹¹⁴ Conferring the self-incrimination right can mean that these juveniles will be lost to whatever help the state might offer, just as applying the self-incrimination right in child abuse and neglect proceedings would make it prohibitively difficult to develop information by which the child's need for protection there could be identified.

There is, however, this distinction between delinquency and other child-protective proceedings. Unwanted resistances to cooperation, which might be overcome by withholding the self-incrimination right, are not apparently common to all juvenile cases; nor are such resistances necessarily an absolute bar to state intervention because of the possibility of other proof sources. By contrast, granting the self-incrimination right to parents and children in abuse and neglect proceedings would more likely be an end to most proceedings.

Nevertheless, the fact remains that some juveniles are likely to be made inaccessible to assistance by *Gault's* grant of the self-incrimination right. On what basis did the *Gault* Court override a contrary legislative judgment that it was more important to have access to these juveniles, who could benefit from this protection, than to give the self-incrimination right to other juveniles who might benefit from that protection?

Gault appears to adopt three arguments: first, little benefit is in fact likely to come to any juvenile from the staff and facilities currently available to state agencies; second, privately induced confessions are likely to be anti-therapeutic when followed by coercive sanctions; and third, many juvenile "confessions" are in fact unreliable.¹¹⁵ The Court's second argument has particular strength; while

114. See generally Schafer, *Generative Empathy in the Treatment Situation*, 28 *PSYCHOANALYTIC Q.* 342 (1959). Commenting on the treatment strategy described by August Aichhorn in *WAYWARD YOUTH* (1951), Schafer notes that Aichhorn "provides a model for identification and ego identity formation that is a way out for an adolescent boy caught in vacillations between extremes of behavior on the part of his parents." *Id.* at 367. See note 106 *supra*.

115. See 387 U.S. at 21-23, 51-55.

it is true that granting power to youths to forestall state intervention can disable many of them from asking the help they need, it is also true that withholding such power can be equally destructive of therapeutic goals.¹¹⁶ If help is seen as merely forced, rather than asked and needed, the coerced youth is likely to lock himself into a power struggle with yet another hostile environment. The known therapeutic techniques for changing self-destructive delinquent behavior cannot succeed unless the active collaboration and cooperation of the youth himself is enlisted.¹¹⁷ Thus, if the Court wants to assure that the reality of therapeutic benefit matches its promise in juvenile dispositions, its most reliable indicator is the juvenile's willingness to accept the offered treatment. Guaranteeing the right against self-incrimination can effectively serve this end.

But, however correct the Court's arguments may be, those arguments do not require imposing the formal imagery of the self-incrimination right in order to keep court personnel always at arms' length from an alleged delinquent juvenile. A more finely tuned adjustment of the competing goals could be made by permitting early and extensive staff access to the juvenile while greatly restricting subsequent uses of the "fruit" of that early access. This alternative formulation is not necessarily inconsistent with *Gault*. It is not, however, clearly envisioned or invited by the Court, but instead is discouraged. Under *Gault*, court personnel could refuse to permit a juvenile access to an attorney, and question him at length,

116. On this issue, the *Gault* Court stated:

It is . . . urged . . . that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders.

In fact, evidence is accumulating that confessions by juveniles do not aid in "individualized treatment," . . . and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observations of [social scientists], it seems probable that where children are induced to confess by "paternal" urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

387 U.S. at 51-52.

117. Any comprehensive treatment plan to be effective requires a degree of cooperation by the patient Almost any form of conventional psychotherapy is extremely difficult to administer without cooperation, and it may be said in general that the effectiveness of the psychotherapies is proportional to the degree of cooperation that is present

Council of the American Psychiatric Assn., *Position Statement on the Question of Adequacy of Treatment*, 123 AM. J. PSYCHIATRY 1458, 1459 (1967). See also Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 772-73 (1969).

as long as they were willing to be disabled by the exclusionary rule from later using any information thus gathered to impose an unwanted disposition on the juvenile. The dogma of the exclusionary rule is such, however, that no self-respecting court official could admit to using it in this way. The exclusionary rule is supposed to operate as an incentive to "do good"; and "good" for the *Gault* Court appears to require that court officials not have easy access to uncounselled juveniles.

The Court should have attempted to apply the self-incrimination guarantee to juvenile court proceedings in a way that would not have disabled court personnel from exerting pressure on a juvenile who could not otherwise be helped, and yet would have forestalled the abuses to which any such easy access might readily lead. The technique for reaching such an accommodation was obviously at hand, if the Court had simply viewed the exclusionary rule as granting permission to deny the right to silence and to counsel, rather than as a device to ensure that these rights were never denied. In this way, the *Gault* Court could have acknowledged the quite legitimate state interest in securing confidential access to juveniles in order to persuade them to accept treatment, while it also protected the countervailing interest of the resisting juvenile by ensuring that, if state persuasion failed, the information gathered during the confidential interviews could not be used to coerce the juvenile into an undesired treatment. If the process of state persuasion fails, that in itself is a reliable indication that little good is likely to come to the juvenile from state intervention (though punitive intervention to protect the community may still be warranted). But if, as is the case under *Gault*, the state is deprived of an easy and openly acknowledged opportunity to persuade the juvenile to accept treatment, we cannot be certain that all who might benefit from whatever therapeutic treatment is available will in fact be identified. It is clear, as *Gault* posits, that the state and many juveniles are likely adversaries in delinquency proceedings. It is not clear that all juveniles must be so regarded from the beginning of their encounter with the state.¹¹⁸

118. An analogous problem is presented in the operation of the Maryland Defective Delinquent Act, recently considered by the Court of Appeals for the Fourth Circuit in *Tippett v. Maryland*, No. 13,415 (4th Cir., Jan. 4, 1971). Under this Act, convicted criminal defendants already sentenced to prison terms could be judged "defective delinquents" and consequently indefinitely confined in a special state institution. The Act on its face envisioned that this referral institution would offer a broad range of rehabilitative services, not available in ordinary prisons, that would be intensively applied to those convicted criminals regarded as particularly "dangerous." See N. MORRIS & G. HAWKINS, *supra* note 5, at 192-200, on the rationale for providing special institutionalization with

The exclusionary rule, by demanding suppression of all "fruits of the poisonous tree," can operate so that the state is unlikely to have any coercive hold on a juvenile who is confidentially questioned and who later refuses cooperation.¹¹⁹ State officials would most likely be unwilling to run this risk for those juveniles who have

intensive therapy for "dangerous" criminals. In *Tippett*, the Act was challenged on a number of constitutional grounds, none of which were persuasive to a majority of the court.

One issue has particular relevance here. Some plaintiffs in *Tippett* had been referred for psychological diagnosis under the Act, but they refused to speak to any of the diagnostic personnel at the institution. As a consequence, the diagnostic personnel considered that they could not make any judgment regarding these plaintiffs' need for treatment as "defective delinquents," and these plaintiffs were retained in the receiving ward of the institution. One of the plaintiffs had been so retained for more than four years, though none of them had been confined beyond the expiry date of his original criminal sentence.

These plaintiffs argued that their rights against self-incrimination were being infringed, and that upon refusal to submit to interviews they should be immediately returned to their referring institutions. The majority dismissed their claim by a labeling game: "[T]he denomination of the proceedings as civil rather than criminal . . . is a factual description of what occurs." Slip op. at 9. Judge Sobeloff, in a separate opinion, agreed that plaintiffs' self-incrimination rights were not abridged, "not on the asserted ground that the Act is 'civil' but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation." Slip op. at 24. He refused, however, to endorse the state's claim that "an inmate's persistent refusal to be examined could indefinitely postpone any judicial hearing, and result in confinement for the rest of his life." Slip op. at 21, 22 n.5.

Judge Sobeloff's approach would permit the treatment institution to focus its resources on a convicted criminal in an effort to convince him that it could offer some useful treatment. Were the inmate able to invoke self-incrimination rights at his initial contact with institution personnel, the opportunity for them to overcome both realistic and fantasy-based resistances would vanish. But unless some limit were imposed on this process, it would merely provide lifetime confinement with no pretense of treatment for those uncooperative prisoners. By permitting self-incrimination rights, in effect, to reappear at the expiry of the original criminal sentence, however, a tolerable limit is placed on the process. If the inmate remains silently uncooperative, the treatment personnel have failed in that persuasive task that is the necessary prerequisite to any successful treatment. (It is of course true that parole possibilities for these mute inmates would be forfeited during their diagnostic detention, but since they were originally referred for diagnosis because they were seen as specially dangerous, it appears unlikely that parole would be awarded in any event before full expiry of their sentences.)

This handling of the self-incrimination right would in many cases furnish a useful guide for courts in determining the reality of the promise of treatment under the Act. As stated in note 117 *supra*, the psychotherapeutic treatment offered under this Act could only succeed if the treatment personnel secured the cooperation of the inmate. But, by withholding his cooperation generally, the inmate could secure his release at the end of his criminal sentence. His release would be assured only if the courts also held that any determination under the Act that an inmate needs special therapy must be based on intensive psychiatric and psychological diagnostic interviews. This result can readily be reached by imposing a high—that is, a "criminal"—standard of proof in the defective delinquency proceedings. Such imposition is justified for the reasons discussed generally in this Article by the "hybrid" character of these proceedings.

119. See generally Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepherded, 56 CALIF. L. REV. 579 (1968).

allegedly committed offenses that are gravely injurious to others or greatly offensive to the community. But for such juveniles, court officials would be free, under the more permissive reading of the *Gault* exclusionary rule suggested here, to forego their option for confidential persuasion and to deal with the juvenile at arms' length from their first encounter. The confidential-persuasion option would most likely be exercised in those cases in which it is not clearly essential for community safety that the juvenile be detained against his will. Casual "joy-riding" car theft, minor narcotics offenses, petty property thefts, or minor assaults among acquaintances are likely examples of such cases, in addition to such noncriminal offenses as truancy or "being habitually beyond parental control." Such matters are the great bulk of the jurisdiction of juvenile courts in this country.¹²⁰

The practical effect of the *Gault* self-incrimination rule, in contrast to its ideal imagery, leaves much room for coercive pressure against the juvenile to discourage him from invoking his self-incrimination right. This follows from the possibility, under *Miranda* as applied to both adults and juveniles, that the right against self-incrimination can be waived without the presence of counsel, and, following such waiver, any information obtained can be used in later proceedings.¹²¹ For adults, it seems likely that *Miranda* retained the uncounselled waiver possibility because it seemed "impractical" and "extreme" to eliminate it—where would enough lawyers be found to man police stations? Would requiring the automatic presence of counsel be popularly viewed as too drastic an innovation? For juveniles, it seems likely that the uncounselled waiver possibility was retained because, rather like Mount Everest, "it was there." But for both adults and juveniles, this possibility is essentially a deceptive disjunction between the rhetorical promise of protection for self-incrimination guarantees and practical reality.¹²² And for juveniles, in particular, retaining the uncounselled waiver possibility resounds most hollowly in the teeth of the *Gault* Court's arguments that juveniles are peculiarly vulnerable to being overborne by offi-

120. See N. MORRIS & G. HAWKINS, *supra* note 5, at 148-53. MUELLER, *supra* note 31, at 13, suggests on the basis of 1965 national arrest statistics that "juveniles are most frequently arrested or referred to court for petty larceny, fighting, disorderly conduct, liquor-related offenses and conduct not in violation of the criminal law such as curfew violation, truancy, incorrigibility, or running away from home."

121. See *In re Gault*, 387 U.S. 1, 55 (1968); *Miranda v. Arizona*, 384 U.S. 436, 474-75 (1966).

122. See Note, *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967); Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967).

cial questioning and, indeed, are more likely than adults to "confess" falsely.¹²³

The current waiver possibility in juvenile proceedings permits, in effect, only rapid, low-visibility coercions. The sensible benefits from "pressure to confess" exerted on a juvenile can be realized, however, only if some time can be spent in relatively relaxed confidential communication in which resistances can be explored, contradictions in attitudes can be identified and thought out, and confidence can be built. The ease with which the juvenile can later avoid undesired consequences by disavowing this questioning seems particularly useful for building necessary confidence. But *Gault*, by retaining the uncounselled waiver, preserves nothing of benefit for the juvenile. It only assures opportunities for abuse. Whatever its virtues in adult proceedings, uncounselled waiver of the self-incrimination right should not have been permitted for juveniles. To paraphrase the Court's earlier characterization of the juvenile court generally, it now seems, regarding the self-incrimination right, "that the child receives the worst of both worlds,"¹²⁴ neither the opportunity for some to be led into acknowledging their need for help, nor the special solicitation for others that their lesser capacities to resist coercive suggestion might demand. Under the *Gault* exclusionary rule, court officials can confidentially question; but they cannot do so openly, honestly, and unashamedly. By withholding this latter possibility, *Gault* overreaches its mark.

Gault holds open the possibility for state legislatures to remedy the Court's failure to legitimate early confidential access to juveniles by court officials. State legislatures can adopt immunity statutes for juvenile court proceedings—as frequently has been done for adult criminal proceedings¹²⁵—that permit court officials to require a juvenile to forego his rights to silence and to counsel during questioning in return for immunity from prosecution for the offense about which the juvenile is questioned. Although such statutes for juveniles might appear impolitically "soft on delinquents," they would be responsive to the reality that coercive sanctions against juveniles are unlikely to have any therapeutic benefit. Precisely because of the public unpopularity of this stance, however, it is unfortunate that the Court did not understand the need to legitimate

123. See note 115 *supra*.

124. *Kent v. United States*, 383 U.S. 541, 556 (1966).

125. See Comment, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311; Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968).

such conduct by juvenile court authorities rather than to leave the question to state legislative action.

IV. PROTECTING PARENTS AND CHILDREN FROM EXCESSIVE STATE ZEAL: WYMAN RE-EXAMINED

In welfare administration—*Wyman's* context—the justification for coercive state intervention in order to protect children from their parents or from self-inflicted harm, or to protect the parents themselves, seems more attenuated. The fact of welfare status necessarily implies that both parents and children need government assistance. But it is not self-evident that all welfare recipients, or even many of them, need more than money for assistance. The government cannot self-evidently claim to know, better than they, the needs of all or many welfare recipients. By contrast, the clear strength of government claims to superior knowledge on behalf of many children in neglect or delinquency proceedings posed a dilemma, discussed in earlier sections, for constitutional arguments to extend all criminal safeguards to those proceedings. That dilemma is much less evident for welfare law administration.

It can be sensibly argued that welfare recipients do need more than money, and that forced home visits are a necessary technique to assure that these additional needs are met. But Congress has not clearly accepted this argument. Welfare laws do not require home visits to accompany welfare assistance as a matter of course. Instead, the state agency in *Wyman* had itself interpreted its mandate under the federal welfare legislation¹²⁶ to include compulsory home visits as a condition of continuing eligibility for welfare assistance. Although federal welfare statutes generally give wide discretion to state agencies, nonetheless the Court in *Wyman* could justifiably have refused to resolve the constitutional arguments for or against the warrant requirement on the ground that home visits were not mandated by the statute as an eligibility condition. The Court's refusal to read the statute in this manner, despite Justice Marshall's dissent, which in effect urged this result,¹²⁷ is further indication of its willingness to accept at face value the state's assurances that beneficial purposes were served by the home visit and its unwillingness to give any substantial weight to Mrs. James' various claims for freedom from government intrusion. Ultimately, the Court may be correct in rejecting Mrs. James' constitutional claims for a war-

126. 42 U.S.C. §§ 601-10 (Supp. IV, 1965-1969).

127. 400 U.S. at 345-47.

rant requirement. But it cannot be correct in denying the substantiality of those claims, and in refusing to avoid overriding her claims unless it were clearly necessary to do so.

But the Court assumed—and we must accept that assumption for purposes of evaluating the Court's application of constitutional doctrine—that a legislative, or a legislatively authorized, judgment had been made that welfare recipients needed services in addition to funds, and that a coerced home visit would ensure acceptance of those services by the recipient or for her children. Accepting this judgment as reasonable—as it assuredly is—it nevertheless does not follow that a warrant requirement should not be constitutionally imposed.

The beneficent purposes of this compulsory visit—either on behalf of the resisting parent or her child—do not necessarily establish the inapplicability of the fourth amendment search warrant requirement. The Court in its earlier decision in *Camara v. Municipal Court*,¹²⁸ requiring warrants for housing code inspections, had clearly held that the fourth amendment guarantees reached beyond searches whose purpose was to collect evidence of criminal violations. As Justice Marshall stated in his *Wyman* dissent, the housing code program in *Camara* was potentially beneficial for the inspected homeowner as well as for his neighbors, who were necessarily affected by the condition of his house. *Camara* cannot be distinguished on this ground from the welfare home visit. Nor can *Camara* be convincingly distinguished from *Wyman* on the ground that the sanction available for refusal to permit housing inspector access, though formally labeled a “criminal” penalty, was more onerous than the total loss of support threatened in *Wyman*.¹²⁹ To distinguish *Camara* on this ground is to embrace a jurisprudence of labels.

Even ignoring the precedential value of *Camara*, the Court should have construed its mandate under the fourth amendment to extend to such a case as *Wyman*. Constitutional text only infrequently yields self-evident applications. But the language of the fourth amendment—that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ,”¹³⁰ on its face belies the constricted construction made by the *Wyman* Court. Only lawyers schooled in construing the fine points of medieval forms of

128. 387 U.S. 523 (1967).

129. This was the *Wyman* Court's proffered distinction regarding *Camara*. 400 U.S. at 324-25.

130. U.S. Const. amend. IV.

action could be fully comfortable with the Court's conclusion that the caseworker visit, compelled on penalty of loss of all means of support, was not a "search," or with its added argument that, even if it were a search, the compulsory visit was so obviously "reasonable" in its purposes that no further judicial participation in assuring the continuing "reasonableness" of that search was required.¹³¹

If a plausible argument could have been made that a warrant requirement would interfere with the welfare agency's ability to carry out its avowed beneficent purposes, the Court's action would have greater justification. But no such argument can be made. And by accepting at face value the government's argument that its benevolent motives justified forcing its assistance on an unwilling recipient, the Court misread the role that it should generally assume in order to tame the excesses of such well-meaning zeal. The Court cannot properly ban all such coercive assistance. But in order to protect the constitutional values, whose vindication is peculiarly entrusted to the Court by tradition and popular expectation, the Court should use its procedural weaponry to assure in some degree that coerced assistance is what it claims to be. Inescapably such assistance will be coercive. But the Court, by mandating independent scrutiny of each case of coercive application, must attempt to assure that this assistance is more than merely coercive. The Court, that is, should do in welfare administration (and in such areas as child abuse and neglect proceedings) what it has begun to do in regulating juvenile court processes.

But, as with juvenile court and child-protective proceedings, the Court must modulate its application of procedural guarantees to accommodate the special characteristics of welfare administration. The *Wyman* Court was correct to suggest that the government's benevolent purposes in welfare programs do differentiate these programs from typical, criminally sanctioned proscriptions. The Court must assure that the differences remain real by insisting that the government beneficence be clearly apparent in individual applications. But it would obviously be quixotic for the Court to demand assurances to such an extent that the beneficent purposes could not be carried out, unless the Court were willing to forbid outright any coercions for such ends.

For this reason, in *Camara*, the Court required a search warrant for housing inspections but refused to apply the ordinary fourth amendment probable cause standard as a precondition for the war-

131. 400 U.S. at 317-18.

rant.¹³² The *Camara* Court concluded that some independent judicial scrutiny of forced government access to inspect homes was necessary in order to protect individual privacy values. But because housing code violations typically cannot be anticipated except in a most general way from the age and character of the dwelling and the time elapsed since prior inspection, the code program would be disabled if a highly particularized showing of probable cause to suspect a violation were required before any inspection could proceed.

It is, of course, equally true that many criminal prosecutions, particularly for victimless crimes or highly organized criminal activity, are disabled by the probable cause standard. The *Camara* Court might thus have argued that the purposes of housing code inspection were no more socially important than the purposes of such criminal investigations. But the Court properly saw a difference, derived both from the plausible promise of benefit to the inspected homeowner's health and safety and from the close interdependence of the health and safety of neighboring homes. Thus, to vindicate the claimed rights of a home occupant resisting inspection would directly and immediately threaten to derogate the legitimate interests of identifiable people. For criminal investigations, particularly those carried out following commission of the crime, there is typically no such countervailing interest at stake.¹³³ And though the criminal, once caught, might well be benefited by rehabilitative services, that promise is obviously less believable than the promise of assistance that accompanies housing code inspections.¹³⁴ Thus, the *Camara* Court required a showing only of "reasonable grounds" for the inspection, rather than "probable cause." The Court further made clear that a housing inspector could show that a particular house was simply part of a general area that was

132. 387 U.S. at 534-39.

133. Even in a clearly criminal law enforcement context, the Supreme Court has permitted a policeman to protect his immediate safety by searching a person for dangerous weapons, although that person was stopped by the policeman without prior probable cause to suspect a violation and although there was no probable cause to believe that the person was carrying a weapon. Rather, throughout its analysis, the Court tested the policeman's conduct by a lesser "reasonableness" standard. *Terry v. Ohio*, 392 U.S. 1 (1968).

134. "Fire inspectors give frequent advice concerning fire prevention, wiring capacity, and other matters, and obvious self-interest causes many to welcome the fire or safety inspection." *Wyman v. James*, 400 U.S. 309, 340 (Justice Marshall, dissenting).

being inspected, and this fact would ordinarily constitute sufficient "reasonable grounds" to support a warrant.¹³⁵

If a warrant requirement had been imposed in *Wyman*, for one limited purpose the Court similarly should have required a showing of "reasonable grounds" rather than "probable cause." The *Wyman* Court was willing to credit three purposes for the welfare home visit: to provide rehabilitative services for the welfare mother; to provide services for, and offer general protection to, the welfare child; and "to know how [the government's] charitable funds are utilized and put to work"¹³⁶—that is, to investigate for misuse or improper receipt of funds. But, as has been noted earlier,¹³⁷ when the welfare mother refuses to accept the visit, it is difficult to imagine rehabilitative services for her that might sensibly be forced on her by a coerced visit. That alleged purpose for a coerced visit would hardly constitute even a "reasonable ground," much less "probable cause," for issuing a warrant.

A home visit has obvious utility for investigating misuse of funds. But it is not clear that the "probable cause" standard should be displaced for this purpose alone. The *Wyman* Court argued that this investigative purpose was essentially similar to that justifying the rule in income tax audits requiring disallowance of a claimed tax benefit unless "[t]he taxpayer produce[s] for the agent's review some proof of a deduction the taxpayer has asserted to his benefit."¹³⁸ Justice Marshall in dissent argued that the analogy was inapplicable because tax audits did not require home searches.¹³⁹ The fourth amendment does not on its face distinguish between searches of "persons, houses, papers and effects." But the good sense of Justice Marshall's objection is that welfare recipients as a class are more vulnerable to government overreaching than are taxpayers. In addition, the availability of this general "search power" for tax auditors will work only sporadic and relatively limited intrusions in matters that taxpayers might wish to withhold, in contrast to the continual, relatively wide-ranging intrusions resulting from the welfare-visit requirement. This difference does not establish that the welfare-visit requirement is impermissible, but rather that it, more than tax audits, requires judicial scrutiny in individual cases

135. 387 U.S. at 535-38.

136. 400 U.S. at 318-19.

137. See text accompanying note 16 *supra*.

138. 400 U.S. at 324.

139. 400 U.S. at 343.

to vindicate important privacy values common to both contexts. But, however close the taxpayer analogy might be to welfare laws, once that analogy is rejected and a warrant requirement is established, there seems little reason to withhold the full rigor of the warrant protection. Thus a showing of "probable cause" should be required for the warrant to issue when the sole purpose of the visit is to investigate a potential misuse of funds.

Only when the alleged purpose of the coerced visit is to provide services or protection for the child does a compelling case appear for adopting, as did *Camara*, the "reasonable grounds" standard to govern issuance of the warrant. When applied to a visit for this purpose, a "probable cause" standard would restrict investigation as sharply, and as much to the detriment of children, as would application of this standard to preliminary examinations in child abuse and neglect proceedings.¹⁴⁰ Relations between parents and, in particular, preschool children have too little ready visibility to expect that children can be adequately protected by generally requiring a "probable cause" showing of imminent injury before state authorities can examine children or their parents against the parents' will. Under this lesser "reasonable grounds" standard, the need for a visit in the home to see the child might not readily be established, but justification could be found for examining the child and parent somewhere on a regular basis. This justification seems particularly available in *Wyman* in view of the history of Maurice James' injuries noted by the Court from Mrs. James' welfare file.¹⁴¹

This argument for a lesser proof standard for state child-protective purposes is not derived from anything peculiar to the welfare program. Rather it is drawn from considering the needs of state child-protective programs generally. Child-protective programs are, however, most rigorously carried out against welfare recipients. Thus a rule that generally permits easy state investigation of parent-child relationships will fall with particular force on welfare families. There is some slight reason to believe that welfare families as a group, for whatever cause, are more likely than other families to warrant state intervention to protect young children.¹⁴² But this evidence

140. See text accompanying note 84 *supra*.

141. See text accompanying note 18 *supra*.

142. A thorough statistical analysis of all child abuse cases reported, pursuant to generally prevailing mandatory reporting statutes, in the United States during 1967 and 1968 has recently been completed. D. GIL, *supra* note 48. Gil found, in analyzing a representative sample of these cases, that "families with a low socio-economic background were overrepresented [as compared to their relative proportion of the popula-

is not strong enough to establish compellingly persuasive differences between welfare and other families. The state would not be able to satisfy a substantial burden of proof in order to justify concentrating its child-protective investigators on welfare families, if such a showing were required.

But would a court be justified in imposing such a proof burden in this matter? The consequences of this burden would be that the state could avoid a "probable cause" showing for child-protective

tion] . . . especially among the nonwhite families. Notable trends concerning family structure seem to be a high proportion of households headed by females, an even higher proportion of absence of biological father, and a higher than average birth-rate." *Id.* at 114.

Gil also found that both present and past welfare status families were overrepresented among those families reported for child abuse. He states

[A]t the time of the abusive incident, 34.1 percent of all families were receiving AFDC grants and 3.1 percent were receiving other public-assistance grants. Thus nearly 4 in 10 families were on public assistance. Altogether, nearly 60 percent of the families had received aid from public assistance agencies during or prior to the study year.

Analysis of the public assistance status of families from different ethnic groups in the sample cohort reveals that 46.3 percent Negro families and 61.3 percent Puerto Rican families, as against 17.6 percent white families, were recipients of AFDC grants at the time of the abuse report; and over 66 percent Negro families, 70 percent Puerto Rican families, and 40.3 percent white families had received some form of assistance during or prior to the study year.

Id. at 112.

There is an obvious likelihood of bias regarding low-income families in the operation of any child abuse reporting statute. Well-to-do families have greater means for avoiding reports. One indication of this fact appears in the figures regarding reporting sources. Of all abuse cases reported, 51.8% came from "medical resources," but of that figure private doctors were an insignificant number. Of all cases reported, 49.0% came from "hospitals or clinics" where the poor are more likely to go, and less likely to be deferentially regarded. Only 2.8% of all reports came from "private medical doctors." *Id.* at 123.

But not all "low socio-economic status" families are or have been recipients of public welfare. It may thus be significant that welfare status families were also overrepresented among those reported for child abuse. This fact must also be viewed with considerable caution, since welfare families are uniquely subject to caseworker scrutiny. Nonetheless, a significant number of the reported families were *past* welfare recipients at the time of the abusive incident and presumably were not then under any general surveillance by welfare officials.

These statistical links are so tenuous—and the total number of child abuse cases reported so small as compared to the total number of AFDC families in the country—that one might dismiss out of hand the proposition that welfare status has any correlative significance with the likelihood of child abuse. (Gil reports that in 1967, 9563 child abuse cases were reported in the United States, of which 5993 could be substantiated. In 1968, there were 10,931 reports, of which 6617 were substantiated. *Id.* at 93. By contrast, 738,000 children received "child welfare services from State and local public welfare agencies" in 1968. U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *CHILD WELFARE STATISTICS* 12 (1969)). Nonetheless, for some families welfare status is itself an indication of social disorganization, and that disorganization could have persuasive parallels to the pathology of child abusing families, as some commentators have described them. While acknowledging the reporting bias for "the poor and nonwhites," Gil suggests "nevertheless, that life in poverty and in the ghettos generates stressful experiences, which are likely to become precipitating factors of child abuse. . . ." *Id.* at 138-39.

investigations only when its investigations were randomly distributed throughout its population or, of course, when they covered all the population. The predictive tools for identifying children in need of protection from their parents for whatever reason are utterly inadequate to yield compelling justifications for preselecting any segment of the population for special attention.¹⁴³ It might be argued that a court demand for such perfection would in fact not interfere with any legitimate state purpose on the ground that any deployment of the state's child-protective investigators is essentially random, whether focused on welfare families or elsewhere, and thus the same number of children needing protection is likely to be found wherever state investigators look. But this argument ignores the fact that there is already a welfare bureaucracy staffed with investigators who have regular contact for many purposes with an identifiable clientele. This investigative staff cannot be diverted to random checks of all families for child-protective purposes. If a court were to require such "randomization" as the price for avoiding a "probable cause" barrier, the option would not likely be pursued by any state agency. Thus there would be a net loss of children in need of care who would otherwise be found.

All of those "lost" children would be from welfare families. But it is not clear that the interests of welfare recipients generally in resisting empirically poorly supported and, to some degree, stigmatizing state identification as peculiarly "child neglect-prone" should outweigh the interests of those needy children among them in securing protection from harmful parents. The interests here of both welfare recipients and needy welfare children are substantial and are in conflict. The *Wyman* Court simply ignored the parents' interests and opted for the interests of the children. A more persuasive resolution here—as elsewhere in the matters discussed by this Article—is to mediate the conflicting interests. Thus a warrant requirement should be imposed, but it should be applied with a relatively permissive standard.

Just as the home occupant in *Camara* could not successfully resist a warrant on the ground that some other area of the city needed inspection as much as, or more than, his area, so it should not be sufficient in the welfare context to allege that other groups of parents and children are equally logical targets for child-protective searches. But, again as in *Camara*, the state official seeking a warrant would

143. See D. GIL, *supra* note 48, at 18-48, 125-32.

be required to show that his child-protective searches were related to a coherent policy followed by his agency, and were not merely, for example, an excuse for harassing a particular unpopular welfare recipient.¹⁴⁴ And the state official would have to show some reason that each specific objection to the child-protective search raised by the welfare recipient in each individual case should be overridden by the court.

If *Wyman* had applied a warrant requirement for welfare searches, the Court would have had to consider a further question. For the same reason that uncounselled waivers of the self-incrimination right were rejected in the earlier discussion of juvenile proceedings,¹⁴⁵ it could be argued that all welfare home visits should be based on warrants. Such a rule would respond to the obvious fragility of the privacy interest in welfare administration. Welfare recipients' utter dependence on public funds and their continuing relationship with their caseworker make it unlikely, in most cases, that they will dare to challenge a requested home visit.¹⁴⁶ The request for permission to enter might thus in itself be seen as unduly coercive.

There is, however, an important reason for retaining the waiver possibility for welfare recipients. If a court were required to decide whether a warrant should be issued without any indication of individual resistance to a particular search, it could effectively do nothing but issue warrants in blank. All welfare recipients would be, by hypothesis, in need of "rehabilitative services" to assist them in leaving welfare status. Thus, it is implausible to imagine that a court, when asked generally for home-visit permissions, would ever conclude that a state agency had no capacity whatever to provide rehabilitative services. The recipient's refusal to accept the visit is the first and necessary step in forcing the welfare agency to define and justify with some precision its actions in "coercing assistance." Only in a dispute between a caseworker who wants entry and a recipient who refuses it, can the court confidently assert, for example, that there is no "rehabilitative purpose," at least for the welfare parent who will be served by this particular visit.

The Supreme Court should have required precise definition and justification to force substantiation of the benevolent conceits of the

144. See *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967).

145. See text accompanying note 123 *supra*.

146. See *Handler & Hollingsworth*, *supra* note 2.

welfare home visit at stake in *Wyman*. And the Court should do the same for all state-coerced “assistance.” The basic failure in *Wyman* was that the Court neither saw the case in its broadest context nor understood that it must address that broadest context in order to advance vitally important judicial goals. *Wyman* does not disable the Court from undertaking this task in the near future. It does, unfortunately, intimate that a majority of the Court is unlikely to do so. But, to paraphrase the Talmudic lesson, if the Supreme Court does not speak for these values, who will? If not now, when?